IN THE MATTER OF A BOARD OF INQUIRY

UNDER THE

HUMAN RIGHTS CODE, 1981
Statutes of Ontario, 1981, Chapter 53, as amended

BETWEEN:

SANDRA GARROD

Complainant

- and -

RHEMA CHRISTIAN SCHOOL and
RAY HENDRIKS and
LEN BANGMA

Respondents

Board of Inquiry: Beverley Baines

Place of Hearing: Peterborough

Dates of Hearing: January 13, May 24 and 25, 1989.

Appearances: Kim Twohig, Counsel for Sandra Garrod and the Ontario Human Rights Commission.

William G. Posthumus, Counsel for the Respondents.

# DECISION OF BOARD OF INQUIRY

## The Facts

### Introduction

By letter dated 21 December 1988 (see: Ex. 1), I was appointed by the Hon. Gerry Phillips, Minister of Citizenship, to act as a Board of Inquiry pursuant to section 37(1) of the Human Rights Code, 1981 (see: S.O., 1981, Ch. 53, as amended) to hear and decide the matter of a complaint made by Ms. Sandra Garrod of Peterborough, Ontario. When Ms. Garrod was dismissed from Rhema Christian School in October 1986, she alleged that her right to equal treatment in employment without discrimination because of marital status, as provided for in sections 4(1) and 8 of the Human Rights Code, was infringed. More specifically, she referred to her common law relationship (see: Ex. 2) and argued that it came within the meaning of marital status as that term is defined in section 9(1)(g) of the Human Rights Code.

The respondents are Rhema Christian School, its principal Mr. Ray Hendriks and its chairman Mr. Len Bangma. The respondents' position is that there was no such discrimination on account of marital status (see: Transcript, vol. I, p.6). However, were I to find to the contrary, then the respondents' position is that they are entitled to rely on section 23(a)and (b) of the Human Rights Code (see: Transcript, vol. I, pp.89 and 350). With respect to section 23(a), the respondents rely specifically on

creed; with respect to section 23(b), they rely on marital status (see: Transcript, vol. II, p.349-51).

Pursuant to section 38(2)(a) of the Human Rights Code, the Ontario Human Rights Commission is also a party to this proceeding. The Commission, in accordance with that same section of the Code, had carriage of the complaint. At the hearing, not only did the Commission submit that the complainant had been discriminated against because of marital status, but also counsel for the Commission argued that the respondents were not entitled to rely on the provisions of section 23(a) and (b). More particularly, she argued that their beliefs did not constitute a creed and that the qualification involved was not a reasonable one (see: Transcript, vol. II, pp.313-4); she also argued that s.23(b) would involve situations where s.23(a) does not come into play (see: Transcript, vol. II, p.362).

A meeting was held on 13 January 1989, at which time it was agreed that the matter would proceed on its merits on 24 and 25 May 1989. Both of those days were fully taken up with hearing the evidence of the two witnesses who were called, Ms. Garrod and Mr. Bangma, and with the argument of counsel.

## I. The Evidence

Ms. Garrod began working as a supply teacher for Rhema Christian School in January 1983 (see: Ex. 2). She is a school teacher who, after graduating from teacher's college almost thirty years ago (see: Transcript, vol. I, p.80) at

the age of 18, taught full-time for the next 5 years and then, while raising three children, taught part-time over the 15 years that ensued before she began supply teaching at Rhema (see: Transcript, vol. I, p.77). By the summer of 1983 Ms. Garrod was invited to teach part-time at Rhema, and she continued to do so until the summer of 1986, when her tasks and her status were changed to those of a full-time teacher (see: Ex. 2).

Rhema Christian School is an elementary school located in Peterborough, Ontario and operated through membership in the Peterborough Christian School Society, Inc (see: Transcript, vol. I, p.81 and vol. II, p.191). It is also associated with the Ontario Alliance of Christian Schools which is composed of some 75 Christian schools (see: Transcript, vol. II, p.192). Rhema is almost entirely funded by the parents of the children who attend and the other members of the Peterborough Christian School Society (see: Transcript, vol. II, p.192). Nonsending parents pay a membership fee of $25 or $50 a person while sending parents are assessed $25 a person; the parent cost per family to operate the school in 1986 was $2,900 (see: Transcript, vol. II, p.193). The chairman of the the school board, Mr. Bangma, said that in his experience students who go to Christian schools come from middle to lower middle class families, some of whom "would be called downright poor" and many of whom "have to struggle significantly in order to make the payments required" (see: Transcript, vol. II,

p.200). The only public funding that Rhema receives is a small grant for a French program; this grant is in the order of $500 to $1000 (see: Transcript, vol. II, p.192).

The affairs, constitution, and operation of the Peterborough Christian School Society, Inc. are set out in three bylaws all of which are dated 5 May 1983 (see: Ex. 6). Mr. Bangma testified that these bylaws were still in effect as of the date of the hearing of this complaint (see: Transcript, vol. II, p.195). Members of the Society must indicate their agreement with these bylaws in writing and Ms. Garrod had done so (see: Transcript, vol. II, p.195 and Ex. 22). This requirement is set out in section 17 of Bylaw No. 1 which states that membership in the Society consists of "the applicants for incorporation and for the registration as a Canadian charity," as well as "such other individuals or families as accept in writing the basis, principles and purpose" of the Society.

The basis of the Society, as provided for in Article II of Bylaw No. 2, is set out as follows:

ARTICLE II

BASIS

The basis of the Society is the following beliefs:

The Bible

We believe the Bible to be the Word of God and that the sixty-six books were inspired by the Spirit of God. We believe that the Bible is the final authority in all matters of faith and practice and is the only true basis of Christian unity.

God

We believe in one God: creator of all, holy, sovereign, existing in three equal

Persons, the Father, the Son and the Holy Spirit. This only true and living God has revealed Himself in the Bible, in Christ Jesus, and in His Creation.

### Christ

We believe in the deity of Lord Jesus Christ, in His existence with the Father, in His virgin birth, sinless life, bodily resurrection, substitutionary death, ascension, and personal bodily return; that He is Lord.

### The Holy Spirit

We believe in the deity of the Holy Spirit Who convinces of sin, of righteousness, and of judgement; Who regenerates, sancitifies, illuminates, comforts those who believe in Jesus Christ, and empowers His people individually and together to fulfil their gospel and cultural mandate.

### Creation

We believe that the world, in its origin, gracious preservation and ultimate restoration, is the work of the Triune God. Since the glorification of His Name is its purpose, we can understand the world rightly only in its relation to Him.

### Man

We believe that man was created in the image of God to enjoy covenantal (promised) fellowship with his Creator and to reflect in his person and works the excellencies of his Maker. He was instructed to exercise dominion over the world in strict and loving obedience to God and to interpret all reality in accordance with His design and law.

### Sin

We believe that sin is disobedience to God's law. Man was tempted by Satan and yielded. By sinning, man forsook his office and task, estranged himself from God and his neighbour, and brought God's curse upon His creation. As a result, man has become corrupt in heart. He rejects the true meaning of life and misuses the knowledge of God which confronts him in creation and in Scripture.

### Salvation

We believe that salvation is by the sovereign grace of God; that by the

> appointment of the Father, Christ voluntarily suffered and died, paying the penalty for our sins; that justification is by faith alone in the all sufficient sacrifice and resurrection of the Lord Jesus Christ.
>
> The Kingdom of God
>
> We believe that the Kingdom of God, being Christ's righteous and universal rule, demands us to respond in loving obedience to our Saviour in the area of education.
>
> The Second Coming
>
> We believe that Jesus Christ shall physically return on the clouds of Glory, at the Father's appointed time. We believe in the bodily resurrection of the just and the unjust; the eternal punishment of the lost; and the eternal blessedness of the saved.

The six principles of the Society are set out in Article III of Bylaw No. 2; and the purpose of the Society, which "is to establish and maintain an elementary and/or secondary school or schools for the daily instruction of our children," is set out in Article IV of Bylaw No. 2.

In giving evidence, Mr. Bangma explained the reason for having a Christian school. He said that "We believe that our faith is the most important aspect of our life, and that every aspect and area of life must be related to faith, and that our children, then, must be taught in the manner that is prescribed by that faith, so that every area of life is reflective of the faith which we have and in which we believe" (see: Transcript, vol. II, p.196). Since the basic principle of this faith "is a belief in the work of Jesus Christ on the cross of Calvary," and since "in conjunction with our faith in Jesus Christ we believe the Bible to be the inspired word of God, and therefore being the rule of

faith and practise," Mr. Bangma asserted categorically that a nonChristian could not teach at Rhema (see: Transcript, vol. II, pp.197-8). Moreover, he said that this is clear from the fact that the members of the Society not only "feel that it is the parents' responsibility to educate children," but also believe that "the teacher becomes an extension of the parent and the parent responsibility" (see: Transcript, vol. II, p.198).

At several subsequent points in his testimony Mr. Bangma was asked to elaborate on the Society's view of the Bible. In doing so, he said that the Society relied on the whole Bible, that is, both the Old and New Testaments, having "no interest in separating the two other than perhaps they may show some dispensational type differences in how God acted and interacted with His people, but it's one message" (see: Transcript, vol. II, p.216). When questioned about the rules that are laid down in the Bible, he referred to the Decalogue or Ten Commandments, saying that with respect to the importance of following other biblical rules "[i]t depends on which one you are referring to" (see: Transcript, vol. II, p.266). For example, the rules with respect to the preparation of food may be important to the Jewish people, but they are not important to the members of the Society; "a lot of pratical rules and regulations ... in the Old Testament are no longer applicable in the New Testament" (see: Transcript, vol. II, pp.266-7).

For her part, Ms. Garrod described Rhema Christian School as "an ecumenical Christian school" made up of staff and pupils from various Christian churches (see: Transcript, vol. I, p.14). Indeed, Rhema is introduced in its Parent Handbook as "a non-denominational Christian School set up to serve the Christian community in the Peterborough area" (see: Ex. 7). Ms. Garrod said that the different churches represented by the staff and students at Rhema included Christian Reformed, Pentecostal, Free Methodists and the United Church, of which she is a member (see: Transcript, vol. I, p.17). When asked about this matter, Mr. Bangma agreed that Rhema is somewhat different from other Christian schools in having a number of denominations represented in its membership (see: Transcript, vol. II, p.198). In elaborating on this representation, Mr. Bangma described it as about 40 percent Christian Reformed and somewhere around 25 percent Pentecostal, with the remainder consisting of as many as twelve denominations including the Fellowship Centre and the Brethern Church (see: Transcript, vol. II, pp.198-9).

When Ms. Garrod first began teaching at Rhema Christian School in January of 1983, Mr. Bangma was not involved in the hiring process (see: Transcript, vol. II, p.201). He did not move to Peterborough until September 1983 (see: Transcript, vol. II, p.195), nor did he become chairman of the school board until 1985 (see: Transcript, vol. II, p.191). Although he provided a description of Rhema's hiring

process during his tenure as chairman (see: Transcript, vol. II, p.194), he was not in a position to, and did not, dispute her evidence about the process that was followed when Ms. Garrod was interviewed and hired. According to Ms. Garrod, when she was interviewed she was not required to be a member of any particular church or religion (see: Transcript, vol. I, p.16). Although she could not recall if she was asked what her religion was (see: Transcript, vol. I, p.16), she did say "I've always been United Church. They knew I was United Church. They hired me United Church" (see: Transcript, vol. I, p. 93). She also said that there was no discussion of the standards of conduct expected of teachers, neither with respect to marriage nor with respect to divorce (see: Transcript, vol. I, pp.16-7).

As well, Ms. Garrod recalled being asked how she would teach differently in a Christian school, to which she had responded that she "wouldn't teach any other way" (see: Transcript, vol. I, p.15). She had elaborated on this question in her original application, saying that "I have always taught in a Christian manner, whether at home, Sunday school, church, youth groups or public school. For me it's just using any talents that I'm given for God's purpose. I stress caring for one another, being sensitive to one another's feelings, recognizing that each one of us is special, no two are the same, and encouraging each to be the best he or she can be, and this they learn by example - what they see, hear and experience. It's imperative that I

provide a positive role model and proper information so that they can continue to grown tall and straight in spirit" (see: Transcript, vol. I, pp.14-5). She did, however, acknowledge that the parents at Rhema thought there was a difference between Christian and public schools since they had set up their own school system "because they want to protect their children from being exposed to what's in the public school system" (see: Transcript, vol. I, p.81).

Ms. Garrod agreed that it was made clear to her that being a teacher at Rhema Christian School involved being a role model for the students. From her perspective, this meant that "I wouldn't injure them in any way, they wouldn't learn from me anything that would be harmful to them" (see: Transcript, vol. I, p.23). Not surprisingly, the perspective of Rhema Christian School is set out in somewhat greater detail. This perspective is found in Bylaw No. 3 of the Peterborough Christian School Society, in the Parent Handbook for Rhema Christian School, and in the contracts which the Rhema school board signed with its teachers.

First, in section 2 of Bylaw No. 3 it is stated that teachers "must (a) declare their unconditional agreement with Article II and III of By-law 2 of the Corporation; (b) faithfully attend a church whose doctrine is in agreement with these articles; (c) be Scripturally sound in their teaching and lead exemplary Christian lives; (d) be members of the society" (see: Ex. 6). This section then provides for the dismissal of "a teacher who proves to be unfit for the

work or because such teacher's instructions or personal life conflict with the basis and purpose of this society." Next, Rhema's Parent Handbook states that a "teacher's life commitment gives our children a sense of cultural meaning and wholeness or meaninglessness. It is of vital importance, therefore, that our children are taught by teachers whose ideas on life we clearly know, whose life commitment we share, and whose lifestyle our children may follow" (see: Ex. 7). Finally, section 3(b) of Schedule E of Rhema's teaching contracts states that a teacher may be "dismissed by the Board for fundamental breach of contract only" and that "[f]undamental breach of contract includes, inter alia, conduct that is in flagrant conflict with Christian ethics and morals" (see: Exs. 4 and 5).

Ms. Garrod confirmed that she was given copies of the Society's Bylaws and Rhema's Parent Handbook when she began teaching (see: Transcript, vol. I, pp.16 and 20-1). At that time, she was asked to read and be familiar with them, and to indicate whether she had any objection to or difficulty with them; she responded that she had no problem with them (see: Transcript, vol. I, pp.21-2). She said that neither the school board nor the principal reviewed them with her, nor was any particular portion emphasized to her (see: Transcript, vol. I, p.22). While it became perfectly clear during her cross-examination that Ms. Garrod did not know the meaning of every single term that was used in these documents (see: Transcript, vol. I, p.86, for example,

"substitutionary death"), she nevertheless testified to her general agreement with their provisions.

However, Ms. Garrod also said that she believed that these documents contained specific words, phrases and statements that were subject to differing interpretations, not only by the different church denominations that were represented in the Society's membership but also by some of the different ministers and congregations within these denominations (see: Transcript, vol. I, pp.82-95). Mr. Bangma disagreed with her, saying that while the wider Christian community might place different interpretations on these provisions (see: Transcript, vol. II, p.241-2), his experience was that "within the Christian school movement as associated with this creed, there is no difference in interpretation, very, very little difference in interpretation" (see: Transcript, vol. II, p.243). He also referred to the Society's beliefs as set out in the bylaws as being interpreted "in the communal sense, in that it is our interpretation of the Christian faith, not yours and not anybody else's out there .... It's a group interpretation" (see: Transcript, vol. II, p.245).

This group interpretation is communicated to potential, or recently hired, teachers by giving them "a copy of the handbook and the by-laws and constitution, they are interviewed, they are taught - there has to be a mutual meeting of the minds, or meeting of faith, if you will" (see: Transcript, vol. II, p.245). When people work through

these statements, Mr. Bangma said, "they know whether they want to associate with us, and if we have any kind of conversation with them, generally we will know whether we want to associate with them, as far as our big commitments being in line with one another" (see: Transcript, vol. II, p.247). However, he also confirmed that the teachers already on the staff when he became chairman of the school board were neither re-interviewed nor were they given any further information regarding the board's expectations of them as role models (see: Transcript, vol. II, p.249).

As well, Mr. Bangma testified that neither Ms. Garrod nor Mr. Hendriks had ever told him that she had any disagreement with any of the provisions of the bylaws or any of the precepts that Rhema stood for (see: Transcript, vol. II, pp.196, 201-2 and 216-7). Although Ms. Garrod never claimed that she had spoken with him, she did say that she could "remember on a few occasions saying that I didn't agree with everything, and on some of those occasions those persons concerned saying, 'but, can you do that,' and I could assure them, yes" (see: Transcript, vol. I, p.92). She said that she "was upfront about it, and ... it never was a problem" (see: Transcript, vol. I, p.95). Furthermore, she testified that she had indicated her difficulties to Mr. Julius DeJager, the first principal under whom she taught at Rhema, and also to his successor, Mr. Hendriks (see: Transcript, vol. I, p.95). Ms. Garrod specifically recalled asking Mr. Hendriks whether she would be teaching the Old or

New Testament in Bible studies because, as she told him, she had trouble teaching certain aspects of the Old Testament. Since it happened that they were to cover the New Testament, apparently nothing further transpired (see: Transcript, vol. I, p.155).

With respect to her teaching contracts, and hence her familiarity with the standard required of a teacher at Rhema as that was set out in Schedule E, Ms. Garrod could not recall having a written contract for 1983. But she did produce copies of two contracts, one dated 15 June 1984 (see: Ex. 3) and the other, 29 March 1985 (see: Ex. 5). Both contracts made explicit reference to Schedule E (see: Exs. 3 and 5) and Ms. Garrod readily acknowledged her familiarity with it, although she also stated that she was never told what kind of conduct would be considered to be in flagrant conflict with Christian ethics and morals (see: Transcript, vol. I, p.19). When she said that she had not been issued a contract for the 1986 teaching year (see: Transcript, vol. I, p.19), counsel for the respondents produced a copy of a contract in her name and dated 15 March 1986 (see: Ex. 23). There was some confusion over whether she could recall signing it (see: Transcript, vol. II, pp. 288-91); but this confusion was cleared up when the original of this contract was produced and she acknowledged her signature (see: Ex. 26 and Transcript, vol. II, p.292). In any event, the contract dated 15 March 1986 made no specific reference to Schedule E.

The events that led up to Ms. Garrod's dismissal began sometime in January 1986 when she approached Mr. Hendriks to tell him that she planned to separate from her husband, Fred Hunter, on the 1st of March 1986 (see: Transcript, vol. I, pp.24-26). In giving evidence, Ms. Garrod recalled wondering whether her employment status might be affected by her separation "because the United Church doesn't exactly hold the same views as the Pentecostal, for example" (see: Transcript, vol. I, p. 25). During her cross-examination, she elaborated on her concern, testifying that it had not arisen from reading the bylaws or the Parent Handbook; rather, "[m]y idea in the separation was ... that ... Rhema Christian School per se was made up of many different families from very strict fundamentalist groups to those, as you talked about before, way from right and left, and I didn't know exactly what the representation was on the board and how they were going to feel about it" (see: Transcript, vol. I, p.120).

Mr. Hendriks advised her to talk to Mr. Bangma, which she did. At the hearing, Mr. Bangma said that "divorce is something that the Bible is certainly not happy with, but it does say that there are instances when divorce may occur;" and so he was able to assure Ms. Garrod that, given "her complaint was that her husband was fooling around ... and had been for 22 years," he did not think that the school board would see her divorce as a problem (see: Transcript, vol. II, pp.203-4). Also, he said he was satisfied that Ms.

Garrod intended to use the separation to make a real attempt at reconciliation, although he realized that it might fail (see: Transcript, vol. II, p.204).

Mr. Bangma and Ms. Garrod both recalled that he went on to ask her whether there was someone else, to which she replied "I'm not a nun, you know, but at this stage there isn't anyone, but I'm still - I'm not over the hill, there could be" (see: Transcript, vol. I, pp.147-8 and vol. II, pp.205-6). According to Mr. Bangma, he "also requested at that time that if that should change, that we would be notified immediately" (see: Transcript, vol. II, p.206). He reported that he "was notified in the beginning of September that she had a male friend with whom she could really speak well" (see: Transcript, vol. I, p.31 and vol. II, p.206).

In the meantime, in June 1986 Ms. Garrod filed for divorce, again informing both Mr. Hendriks and Mr. Bangma (see: Transcript, vol. I, p.27). She said that she was not given any reason to believe that her divorce might affect her employment status at the Rhema (see: Transcript, vol. I, p.30). Then, towards the end of June Ms. Garrod met her present husband, Ron Garrod (see: Transcript, vol. I, p.30). Since the school staff went their separate ways during the summer, Ms. Garrod thought that it would have been August when school staff meetings were held that Mr. Hendriks and the other staff members would have become aware of her developing relationship with Mr. Garrod, although the parent who had rented her an apartment from 1 August to 1 November

definitely knew earlier (see: Transcript, vol. I, p. 30). What the school staff members knew in August was that Mr. Garrod often picked her up at the School, or drove over at lunch time to eat lunch with her (see: Transcript, vol. I, p.31).

Until the 2nd of October 1986, no one voiced any objection to her about her relationship with Mr. Garrod. "On the contrary," Ms. Garrod said, "I gathered that everyone was happy for me. Many parents knew at that stage. I was openly telling them that I had met a friend, that I had a friend" (see: Transcript, vol. I, p.31). However, on the 2nd of October all this changed. That day Mr. Bangma approached Ms. Garrod to say that he had to talk to her because he had just received a phone call bringing a rumour about her to his attention (see: Transcript, vol. I, p.32 and vol. II, p.207). Both agreed that Ms. Garrod did not wait for him to continue but volunteered, "do you mean about my living arrangement" (see: Transcript, vol. I, p.37 and vol. II, pp.207-8). When he said yes, she interpreted him to mean "do you have a sexual relationship with him," to which she replied in the affirmative (see: Transcript, vol. I, p.38).

At this point Ms. Garrod and Mr. Bangma offer different versions of what he said next. According to Ms. Garrod, he said "Sandra, I wish you had lied" (see: Transcript, vol. I, p.38). Mr. Bangma denied saying these words; according to his testimony, he "indicated that that was too bad, I wished that that were not true .... but at no time did I want her

to lie or misrepresent any of the facts" (see: Transcript, vol. II, p.208). Both agree that Mr. Bangma then said he would have to tell the school board about her open admission (see: Transcript, vol. I, pp.38 and 122, vol. II, p.208). At the hearing Mr. Bangma confirmed that there was no question about Ms. Garrod's teaching otherwise (see: Transcript, vol. II, p.208). In fact, with respect to her teaching prior to October 2nd, Mr. Bangma agreed that Ms. Garrod had been a good teacher, that she was sensitive to the needs of the children she was teaching, and that she knew how to gauge the maturity of the students (see: Transcript, vol. II, p.271). He said "I also realize that she did love and care for our children. That's what made her a good teacher" (see: Transcript, vol. II, p.274).

When referring to the Rhema school board, Mr. Bangma meant the board of directors of the Peterborough Christian School Society Inc.; that board has the ultimate responsibility for hiring and firing teachers at Rhema Christian School (see: Transcript, vol. II, p.240-1). The school board, which consists of nine or ten members, had a regularly scheduled meeting for that same evening (see: Transcript, vol. II, pp.208 and 210). According to Mr. Bangma, the "board was very shocked at what occurred" (see: Transcript, vol. II, p.260); and they were unanimous in deciding that Ms. Garrod could not continue to teach, the only discussion being whether she should be fired immediately or whether the process should be more orderly

(see: Transcript, vol. II, pp. 210-1). They decided to ask for her resignation; if she refused, the dismissal procedures were to be followed (see: Transcript, vol. II, p.210). Mr. Bangma and Mr. Hendriks, who meets with the board but is not a voting member, were directed to carry out this decision (see: Transcript, vol. II, p.211).

Consequently when Ms. Garrod came to the school the next morning which was Friday, October 3rd, Mr. Hendriks and Mr. Bangma told her that someone else was in her classroom and then asked for her resignation (see: Transcript, vol. I, pp.39-40 and vol. II, pp.211-2). Ms. Garrod testified that she "was shocked ... and then ... immediately started crying" (see: Transcript, vol. I, p.40). At that point, Mr. Hendriks and Mr. Bangma told her to take the day to think about what she was going to say and that they expected her back at 3:30pm with her resignation (see: Transcript, vol. I, p.40). Mr. Hendriks and Mr. Bangma also told Ms. Garrod that the decision to ask for her resignation was unanimous (see: Transcript, vol. I, p. 42).

At the hearing, Mr. Bangma elaborated on the question of why Ms. Garrod's resignation was being sought at that time. He said that her conduct was not acceptable to the Society because it was in flagrant conflict with the principles of Christian morals and ethics (see: Transcript, vol. II, p.212). In his words, "It was that she was living with someone to whom she wasn't married" (see: Transcript, vol. II, p.212). "It wasn't that she did it flagrantly ...,"

he said, "but it was a flagrant conflict in that it's a major, major item. This is not a sin of minor proportions" (see: Transcript, vol. II, p.212). As he further explained, Ms. Garrod had denied the sanctity of marriage, first, in that she was still married, and second, by living with someone who was not her husband" (see: Transcript, vol. II, p.213). As well, she did not know whether the man with whom she was living was a Christian (see: Transcript, vol. II, p.213).

Although Mr. Bangma agreed that there was no statement in the bylaws that specifically set out the Society's position on marriage and divorce (see: Transcript, vol. II, p.249), he said that "within our community" there would not be different interpretations of the rules (see: Transcript, vol. II, p.250). However, he also said that the acceptability of a person's separation or divorce would depend on the circumstances (see: Transcript, vol. II, p.253). Then, with respect to remarriage, he said "We do look at marriage as being something that's for life. Now, under the number of circumstances that, shall we say, are allowable exceptions, we still are looking at the new marriage as one for life" (see: Transcript, vol. II, p.255). And finally, with respect to common law relationships in particular, he testified that someone living in such a relationship would not become a member of the Society; but if they were already a member, "at that point the Society would have to deal with it, and they would have to then

search the avenues in dealing with that" (see: Transcript, vol. II, p.252-3).

When asked how the individual teachers would know what the allowable exceptions were if they were, for example, contemplating divorce, Mr. Bangma replied "I suspect that they would come to the board and to discuss the matter, and to receive verification" (see: Transcript, vol. II, p.256). He agreed that the teachers are not told that they must consult with the board on certain issues before entering into relationships or engaging in certain conduct; but Ms. Garrod "was when she came to me asking the board's position concerning her status of employment with respect to her separation" (see: Transcript, vol. II, p.256). At that time, Mr. Bangma testified, he went through the scriptures that deal with marriage, adultery and divorce, telling her the circumstances under which she might legitimately pursue her divorce (see: Transcript, vol. II, p.276). With respect to the events that actually occurred, however, he said the board's view was that while there "Maybe mitigating circumstances as far as to explain why she did what she did, ... there are no extenuating circumstances to approve of what she did, and there was none to say that" (see: Transcript, vol. II, p.257).

Ms. Garrod returned on that Friday afternoon without her resignation. In the interval, on the advice of her own minister, she had checked her teaching contract. However, Ms. Garrod then gave conflicting evidence as to whether she

actually raised the issue of her contract with Mr. Hendriks and Mr. Bangma at that Friday afternoon meeting (see: Transcript, vol. I, pp.40 and 43). What she did recall was agreeing to resign, prompting Mr. Hendriks to offer the use of the office typewriter to type it out (see: Transcript, vol. II, p.214). Ms. Garrod refused, saying that she preferred to bring it in on the weekend, to which they agreed; she also asked what they were going to tell the children (see: Transcript, vol. I, p.41 and vol. II, p.217).

On Saturday, Ms. Garrod left a letter dated 4 October 1986 on Mr. Hendriks' desk (see: Transcript, vol. I, p.42). In it she informed him that she had changed her mind, that she would not resign, and that Schedule E had been ignored (see: Ex. 9). As a result of receiving this letter, Mr. Bangma called another board meeting which was held on the afternoon of Sunday the 5th of October (see: Transcript, vol. II, p.221). Afterwards, Mr. Bangma called Ms. Garrod to advise her that, since she had not resigned and had not as of that time been dismissed, she should return to the classroom on Monday (see: Transcript, vol. I, p.43 and vol. II, p.221). He also wrote her a letter dated 5 October 1986 informing her that in the light of her "current alleged conflict with Christian ethics and morals," the school board wanted to meet with her on the evening of Monday the 6th of October 1986 (see: Transcript, vol. I, pp.43-4). He said that this meeting would be the hearing prescribed in section 3 of Schedule E of her teaching contract (see: Ex. 10).

Also on that Saturday, Ms. Garrod left copies of a letter to each of her students "very conspicuously in their math book" (see: Transcript, vol. I, p. 45). Ms. Garrod's students included her own grade five/six class, as well as those in grade seven/eight (see: Transcript, vol. I, p.45). When it became apparent that Ms. Garrod was going to be in her classroom on Monday, she removed these letters at Mr. Hendriks' request (see: Transcript, vol. I, p.46). Although Mr. Bangma testified that he had difficulty with several of the statements in her letter, these concerns need not be detailed here given that the letter was never actually received by any of the students (see: Transcript, vol. II, p.272-6).

What is more relevant is that on Monday the 6th of October when she was back in the classroom, Ms. Garrod told her students that she "had been kept out of the classroom [on Friday because] .... I was living with a man that I would be going to marry on November 1st" (see: Transcript, vol. I, p.47). Prior to this discussion with the students, she had not told Mr. Bangma that a specific date had been set for her pending marriage (see: Transcript, vol. I, p.72). Moreover she also testified that, prior to that day, she had mentioned her boyfriend in the classroom only twice, once as the source of some Trent Waterway System maps and again as the person who grew the grapes which she took to school everyday (see: Transcript, vol. I, p.49).

At the October 6th hearing, Mr. Bangma began by stating the charge which was "that she was in flagrant conflict with Christian morals and ethics to the extent that she was living with a man to whom she was not married" (see: Transcript, vol. II, p.223). Ms. Garrod, who was not represented at this meeting (see: Transcript, vol. I, pp.50-1), then affirmed her living arrangements (see: Transcript, vol. I, p.139 and vol. II, p.223). On being invited to explain herself, according to Mr. Bangma she said "that this was not a situation she would want her child to be involved in, but she was ... for once in her life ... basically happy. She said she had 22 years of a miserable marriage, and now she's in what she presumed to be a Godly relationship" (see: Transcript, vol. II, p.224). Mr. Bangma also said that he "asked her three times if she had anything further to add" (see: Transcript, vol. II, p.224).

Although Ms. Garrod had considerable difficulty recalling the discussion that transpired at this meeting (see: Transcript, vol. I, pp.50-1 and 135-9), she did agree that she made these responses and confirmed that she was asked if she had anything further to say (see: Transcript, vol. I, pp.140-4). In her testimony, she maintained that she had said very little because she "just wanted to get out of there" since she "didn't think anyone was receptive to hearing anything that I had to say" (see: Transcript, vol. I, p.50). However, when Mr. Bangma indicated his distress about what she had told the students earlier that day, at

least as he understood it from the way in which his own 12 year old son had behaved toward him at supper that evening (see: Transcript, vol. II, pp.225-8), Ms. Garrod recalled that she had "emphatically defended what I had said and how I had said it ... and said I would be happy to discuss it with any parent" (see: Transcript, vol. II, p.144).

On Tuesday, October 7th, Ms. Garrod received a letter from Mr. Bangma dated 6 October 1989 (see: Transcript, vol. I, p.51). In it, he referred to the October 6th hearing and advised her that she was suspended with pay until the 16th of October 1989, at which time she would be informed of the board's final decision concerning her employment status (see: Ex. 12). Although Mr. Bangma testified that Ms. Garrod received this letter of suspension on the morning of Monday the 6th of October, it seems likely that, given his reference in the letter to the information received during the hearing, he has mis-remembered the precise sequence of these events as they in fact occurred (see: Transcript, vol. II, p.223). In any event, in this matter, nothing of any significance turns on whichever of these dates the letter of suspension was actually delivered.

The Rhema school board then met again and conclusively decided to dismiss Ms. Garrod (see: Transcript, vol. II, pp.229 and 237). They composed a letter of dismissal which was dated 15 October 1986 and signed by Mr. Bangma (see: Transcript, vol. II, p.218). There is no disagreement between the parties as to this being the effective date of

her dismissal nor, indeed, as to the fact that she was actually dismissed by the Rhema school board (see: Transcript, vol. I, pp.52-3 and vol. II, pp.270-1).

The letter of October 15th stated that in light of Ms. Garrod's "cohabiting with Mr. Garrod" the school board had "no alternative but to find you to be in fundamental breach of contract" and it referred, as well, to the definition of "fundamental breach of contract" in section 3(b) of Schedule E of her teaching contract (see: Ex. 13). In his testimony, Mr. Bangma explicitly stated that neither her divorce, nor her separation, nor the fact that she had a boyfriend caused Ms. Garrod to be dismissed; rather, "[t]he reason she was dismissed was because she was cohabiting with one to whom she was not married" (see: Transcript, vol. II, p.230).

This letter also made more detailed references as follows: to the school board's support of her decision to separate from Mr. Hunter in March; to the 2nd of October when "it was rumored that you were telling the students of a certain boyfriend and that indeed you had taken up residence with him;" to her telling Mr. Bangma on that occasion that this was inconsistent with her religious position of a year previous; to the hearing on the 6th of October when she admitted to living with Ron Garrod when still married to Fred Hunter; to her saying at that hearing that she would not want her daughter to live in a similar situation; to the fact of her suspension with pay; and, finally, to the 6th of October when she "apparently discussed the details of [her]

situation with the children of grades 5-8 before the Board had opportunity to inform the parents of this sensitive and personal matter" (see: Ex. 13).

The letter concluded by stating that "In view of all the above and in particular in view of your admitted adulterous relationship which you refuse to give up, the Board has no alternative but to terminate your contract;" and further, that the "Biblical injunctives toward marriage, adultery and divorce make it impossible for you to return to your classroom to teach in the influence of Christian morals. These morals are taught both actively and by role model by our staff and must be maintained in order to fulfill your contract" (see: Ex. 13).

Not surprisingly, Ms. Garrod took issue with some of the statements that were made in this letter, including denying that she had ever told the students that she was living with Mr. Garrod on or before Thursday the 2nd of October (see: Transcript, vol. I, p.55). She said that she only did so thereafter on Monday the 6th of October because she thought that they had been "told a lie as to why I was absent on Friday ... and were to be told another lie as to why I wasn't coming back" (see: Transcript, vol. I, pp.55 and 144-6). According to Ms. Garrod, the students "never would have known had I not been kept out of the classroom" (see: Transcript, vol. I, p.55). She said that she had kept her own apartment with most things in it until the week of November 1st (see: Transcript, vol. I, p.56); and that her

18 year old son had lived in it with her (see: Transcript, vol. I, pp.63-4).

As well, she also denied discussing the "details" of her situation with the students (see: Transcript, vol. I, p.56); and she took issue with the references to her being "still married to Mr. Fred Hunter" and to her relationship with Mr. Garrod being characterized as "adulterous" (see: Transcript, vol. I, p.55). Ms. Garrod stated several times that she did not consider herself married because she had had a legal separation since June; moreover, the divorce itself had already been through the courts and was approved on September 23rd (see: Transcript, vol. I, pp.55, 100, 104 and 112). On this point, however, it must be interjected that Ms. Garrod not only testified that her divorce did not become absolute until the 24th of October 1986; but also, that she knew that that was the date after which she was free to remarry legally (see: Transcript, vol. I, pp.100-1 and 104-5).

Finally, she denied ever being asked to give up her living arrangements with Mr. Garrod (see: Transcript, vol. I, p. 57). When questioned about why she had not refrained without being asked, she initially responded: "[b]ecause I think that's for kids" (see: Transcript, vol. I, p.106). That comment notwithstanding, Ms. Garrod also testified that, had she been asked, "it would have been easy to give it up - the living arrangement. We were getting married in three weeks" (see: Transcript, vol. I, p.72 and 124-5).

Moreover, she said that in fact it did occur to her to move out after the furor arose, but she "was in no condition to do then [sic] .... because everyone had turned on me" (see: Transcript, vol. I, p.132-3).

Mr. Bangma confirmed that Ms. Garrod was not asked if she would be willing to give up her living arrangement pending her marriage (see: Transcript, vol. II, p.262). Moreover, even if she had been willing to give up her living arrangement, there still could have been a problem according to Mr. Bangma because she might not have done it in such as way as to "accomplish the goals of repentance and forgiveness" (see: Transcript, vol. II, p.263). At this point, Mr. Bangma acknowledged that the board would have no way of knowing what a teacher actually believed or did not believe (see: Transcript, vol. II, p.264). In fact, he went on to say that "[s]incerity, whether a person is sincerely right or sincerely wrong is not the issue;" a person could be as sincere as she wanted about her belief being conformity with her interpretation of the bylaw and it would still "be a problem for us because her lifestyle is indicating that she doesn't bear the same interpretation as we do" (see: Transcript, vol. II, p.265).

When Ms. Garrod was asked whether she thought that her relationship with Mr. Garrod affected her ability to be an appropriate role model for the students, she answered in the negative (see: Transcript, vol. I, p.64). She explained this by saying that it was "[b]ecause I understand role model as

being what I portrayed to the children when I'm with the children" (see: Transcript, vol. I, pp.67 and 125). She said that she thought that her conduct in the classroom, anytime she was with the children, fell "into their category of exemplary" and that her physical commitment to Mr. Garrod was "all part and parcel of the same thing" (see: Transcript, vol. I, p.67). Further, "I was a person who was a valuable person, everyone respected me, and I had been there and proven myself as an effective role model as a person. I was into their homes, I was welcome, we were a family, and to me the whole thing got mixed up in there and lost because of somebody, or the weight they carried, or whatever" (see: Transcript, vol. I, p.67).

However, Ms. Garrod also refused to give a yes or no answer to the question of whether her living arrangement was the type of lifestyle that she would want her students to follow, saying instead that "I don't think it's a yes/no answer" (see: Transcript, vol. I, p.98). As well, on several occasions while reiterating that her lifestyle was exemplary, she added, albeit without further elaboration, that "[t]here are extenuating circumstances" (see: Transcript, vol. I, p.107, 110 and 140). And, on Monday the 6th of October when she told the grade sevens and eights why she had been kept out of the classroom on the previous Friday, she testified that "I was saying don't use me - my exact words - as a complete role model. I'm human too, and the time comes when each one of you makes your own decision,

and that's why we educate them. We don't want to send them out into the world to be little puppets" (see: Transcript, vol. I, p.126). With respect to this last point, Mr. Bangma seemed to indicate that the Society had a very different perspective. As he put it, "Teachers are not hired to explain positions under question. Teachers are hired to explain things that are not in question which we all agree on" (see: Transcript, vol. II, p.272).

One further aspect of Ms. Garrod's living arrangements that troubled Mr. Bangma was the duration of the time frame in which the events relating to her separation, divorce and remarriage took place; he considered that everything seemed to happen too quickly (see: Transcript, vol. II, pp.254-5). Although he agreed that the question of the time frame was not one of morality but rather "more of a concern for the individual," he also added that "I don't want my children necessarily thinking that one month is enough" (see: Transcript, vol II, p.255). Ms. Garrod had a very different perspective, saying that "to do it as quickly as I could, made a whole lot of sense. If you're done with something you don't belabour it, you cut it off and finish it, and then you're free to begin with something else" (see: Transcript, vol. I, p.106).

In her evidence, Ms. Garrod also referred to another teacher at Rhema Christian School, a French teacher, who was separated and involved in a relationship similar to hers (see: Transcript, vol. I, p.72). The only difference was

that the French teacher already had her divorce and it was her boyfriend who was not divorced yet (see: Transcript, vol. I, p.72). According to Ms. Garrod, this French teacher was hired in 1985 or 1986 and she resigned in June of 1986 because she was supposed to be moving out of the country (see: Transcript, vol. I, p.73). However, Ms. Garrod did not know whether either Mr. Bangma or Mr. Hendriks were aware of this situation (see: Transcript, vol. I, p.73). For his part, Mr. Bangma testified that he was unaware of this situation, nor did he know of any other similar situation involving a Rhema teacher, "and if there were another teacher and it happened again, we would do the same thing ten times over, and if it meant going through this kind of situation ten times over, we'll continue to do it ten times over" (see: Transcript, vol. II, p.230-1).

Subsequent to receiving the October 15th letter of dismissal, Ms. Garrod took steps to activate the appeal procedure that was set out in Schedule E of her teaching contract (see: Transcript, vol. I, p.57). As provided for in section (4)(b) of Schedule E, Ms. Garrod gave notice to the school board in a letter dated 28 October 1986 that she was exercising her right to appeal her dismissal to the prescribed arbitration committee (see: Transcript, vol. I, pp.57-8 and Ex. 14). Apparently this process took place under the aegis of the Ontario Alliance of Christian Schools. Accordingly, on the 11th of November 1986 the O.A.C.S. wrote to Ms. Garrod to report that her request for

an arbitration committee had been reviewed and found appropriate by their Coordinating Committee (see: Ex. 15). The O.A.C.S.'s letter also detailed the specific procedural responsibilities for and timing of this arbitration committee appeal process (see: Ex. 15).

First, Ms. Garrod was to notify the school board of the name of the person who was to represent her interests on the arbitration committee which she did by letter dated 10 November 1989 naming Mr. James Cooley, business agent for the United Electrical Workers Union (see: Transcript, vol. I, p.59 and Ex. 16). In a letter dated 18 November 1989 Mr. Bangma then advised Ms. Garrod that the school board's representative on the arbitration committee would be Mr. Hans Vink, a former school board chairman and current parent (see: Transcript, vol. I, p.60 and Ex. 17). According to Exhibit 15, the next step was for the parties to reach an agreement about the name of the third arbitrator who would act as chairman. Ms. Garrod produced in evidence a copy of a letter to Mr. Hans Vink from Mr. James Gooley in which Mr. Gooley stated that he was enclosing a list of the names of more than 70 arbitrators who are recognized as such by the Ontario Ministry of Labour (see: Transcript, vol. I, pp.61-3 and Ex. 18).

According to Ms. Garrod's testimony, the parties could not agree about the name of the third arbitrator (see: Transcript, vol. I, p.61). She reported that Mr. Gooley told her that Mr. Vink "refused to pick one of those because he

said that he had to know that he was Christian, the arbitrator would be Christian, and so it just was a stalemate and didn't go any further" (see: Transcript, vol. I, p.61). However, Mr. Bangma said that since the school board understood Mr. Gooley to be requesting that someone from the list of provincial arbitrators be asked to adjudicate this matter singlehandedly, the board had instructed him to tell Mr. Vink to continue to pursue this issue under the provisions of the contract (see: Transcript, vol. II, pp.235-6 and Ex. 24). More specifically, the school board was prepared to invoke section 4(h) of Schedule E which provides that, in the event of a disagreement, either party can request the Ontario Alliance of Christian Schools to name the third member of the arbitration committee (see: Transcript, vol. II, pp.233-4 and Ex. 24).

Finally, there is the question of the effect of her dismissal on Ms. Garrod's life. She testified that she was "truly shocked" by it (see: Transcript, vol. I, p. 71); and that, as demonstrated by her tears at the hearing, she was still "emotionally affected by it" (see: Transcript, vol. I, p.68). She said that it had affected her "brand-new marriage" in that they had "planned to have a certain income and all of a sudden we just have one" (see: Transcript, vol. I, p.71). She also referred to having given up her ties with, for example, the Peterborough County Board of Education, to how hard it would be to get back into someplace else, and to how being middle-aged meant that

"it's not the easiest time of your life to go back into an entirely new job" (see: Transcript, vol. I, pp.71 and 154).

Immediately after receiving the October 15th letter of dismissal, Ms. Garrod began to seek other employment. On the 16th of October 1986 she had an interview with the Peterborough County Board of Education and thereafter she personally contacted schools where she had worked before going to Rhema (see: Transcript, vol. I, p.77). However, at the hearing she said that she had not yet found employment as either a full-time or a part-time teacher (see: Transcript, vol. I, p.77). She did do supply teaching for the Peterborough County Board of Education, teaching in 38 classrooms in 19 different schools (see: Transcript, vol. I, p.77). She testified that she received $265.68 for supply teaching between October 16th and the last school day in December 1968, and that she had received no other employment income for that same period (see: Transcript, vol. I, p.77 and Ex. 20). She continued to supply teach during 1987 and into 1988 (see: Transcript, vol. I, p.78), with her total employment income before income tax deductions for 1987 being $2323.65 (see: Ex. 21).

As part of her on-going efforts to find a teaching position, whether full- or part-time, in different areas of the province, Ms. Garrod said that she also took a Manpower course that had indicated that teaching was the employment which she should be seeking (see: Transcript, vol. I, pp.78-9). Although technically speaking it is not necessary for

her to upgrade her existing Teacher's College certificate, she did acknowledge that it "probably" is not sufficient to get her a full-time teaching position in a public school now, "in this day of specialists" (see: Transcript, vol. II, p.286). Accordingly, she has now enrolled and, by the time of the hearing, was in the second year of a full-time early childhood education program (see: Transcript, vol. I, pp.79-80 and vol. II, p.286).

At the hearing there was evidence given about two other factual matters that also should be raised at this point. One pertained to Ms. Garrod's employment status as she began the 1986/78 teaching year and the other concerned her 1986/87 salary. With respect to her employment status, Ms. Garrod testified that she did not know whether her full-time teaching status, which began in August 1986, was as a probationary or permanent employee (see: Transcript, vol. I, pp.73-4 and 153). She agreed that she knew that Rhema used probationary contracts of at least a year full-time before renewable contracts were given, but she said that she did not know whether her accumulated part-time service was taken into account in this context (see: Transcript, vol. I, pp. 74 and 153). However, since Ms. Garrod did say that she would not have had a yearly contract if she were a permanent employee (see: Transcript, vol. I, p.74), the production of her 1986 contract apparently resolved this issue in favour of her probationary status during the 1986/87 teaching year.

With respect to the question of her 1986/87 salary, Ms. Garrod testified that she thought that her 1986/87 salary was "in the neighbourhood" of $23,000.00 (see: Transcript, vol. I, p.73). However, Mr. Bangma disagreed (see: Transcript, vol. II, p.209). Unfortunately, this dispute could not be resolved simply by referring to the salary shown on the face of Ms. Garrod's last contract with Rhema (see: Ex. 26). Although that contract was dated 15 March 1986 and stated that it was to take effect on the 1st of August 1986, both Mr. Bangma and Ms. Garrod were in agreement that the salary of $12,359 shown on the face of it did not represent her salary for that year (see: Transcript, vol. II, pp.208-9 and 289). Accordinging to Mr. Bangma, the $12,359 was to be increased by $6100, making Ms. Garrod's total salary for the 1986-87 teaching year $18,459 (see: Transcript, vol. II, p.209).

Ms. Garrod's evidence in support of the higher amount was based on calculations that she had made from her paystubs from Rhema covering the period from the beginning of August to the end of October 1986. Although these paystubs were not introduced in evidence, she said that she could produce them (see: Transcript, vol. II, pp.295-6). According to Ms. Garrod, these paystubs showed a total of $5,885.04; then, since that period covered 13 weeks or a quarter of a year, she had multiplied that $5,885.04 by four to get a total salary of $23,540.16 (see: Transcript, vol. II, p.283). Further, she testified that she was paid, not

semimonthly for a total of 24 payments a year, but rather biweekly for a total of 26 payments a year (see: Transcript, vol. II, p.287). As well, Ms. Garrod stated that the salary grid for the 1985/86 year showed that the maximum salary, which was what a full-time teacher would earn, for category one, the category that she was in, was $22,345; and that would have been upgraded for the 1986/87 teaching year (see: Transcript, vol. II, p.290). She did not know if Rhema was paying 100% of the grid or something less (see: Transcript, vol. II, p.290).

Some reference was made to the fact that Ms. Garrod's teaching contract set out the number of fringe benefits to which she was entitled as a teacher. According to Schedule D a dental plan was included among those benefits (see: Ex. 4). Ms. Garrod testified that she had incurred a large dental bill for crowns and bridgework that was done between October 1986 after she had left Rhema and December 1987, and for which the initial appointment had been made sometime in August or September 1986 while she was still employed at Rhema (see: Transcript, vol. I, pp.74-5 and 150-1). She produced in evidence a copy of a receipt which she testified showed the total amount that she was billed for this dental work which was $4922.00 (see: Transcript, vol. I, p.75 and Ex. 19); and she said that if the plan had approved it, she would have been reimbursed for fifty percent of her bill (see: Transcript, vol. I, pp.151-2).

II. Findings With Respect To The Evidence

Without more, that is, without invoking and examining the statutory framework, the only question that can be resolved at this stage is whether Ms. Garrod was, as she alleged in her complaint, dismissed from her employment as a full-time teacher at Rhema Christian School because she was living in what is conventionally characterized as a common law relationship. I have concluded that there is little, if any, disagreement between the parties that this was in fact the case, although they differ strongly over whether this gives rise to legal consequences and if so what they are. My conclusion notwithstanding, it is also clear that some of the facts that were presented at the hearing could sustain a different picture. That is to say, arguably the complainant was more ambivalent about her characterization of her relationship with Mr. Garrod and/or arguably the respondents relied on other grounds for dismissing her. Under these circumstances, my assessment of the evidence pertaining to this question must be somewhat more detailed.

As Ms. Garrod herself testified, she acknowledged her common law relationship immediately upon Mr. Bangma's instigation of their October 2nd discussion. Nor did she ever make any attempt to change this characterization of her relationship with Mr. Garrod, neither during any of her ensuing discussions with Mr. Bangma nor at the October 6th meeting of the school board that she was invited to attend. I emphasize the openness and consistency of Ms. Garrod's

characterization only because she also persisted in referring to the fact that she kept her own apartment throughout this same time period. In other circumstances, such references might be construed as equivocation. However, I do not believe that Ms. Garrod intended them as such, nor was this possibility ever raised by the respondents. Rather, from the way in which she disclosed this information I have concluded that Ms. Garrod tendered it as evidence that she believed in the personal and private nature of her living arrangements.

In giving his evidence, Mr. Bangma also made it clear that neither he nor the school board had any reason to dismiss Ms. Garrod before he, and then they, became aware of the fact that she was living in a common law relationship on October 2nd. To the contrary, as he testified, prior to that date Mr. Bangma had considered Ms. Garrod to be a good teacher, one who also loved and cared for the students. As well, until that time he had believed that she not only was sensitive to the students' needs but also knew how to gauge the level of their maturity. Moreover, there is also further and independent evidence of the school board's positive opinion of Ms. Garrod's teaching in light of the fact that they had just promoted her or, more accurately, hired her as a full-time teacher at the start of the 1986/87 school year.

So, while there might be some controversy over whether Ms. Garrod was dismissed simply because she was living in a common law relationship per se or whether it was because she

was living in that relationship while still married, and there might even be some controversy over whether she was dismissed on or before receipt of the letter of October 15th, it is still clear from that letter that her common law relationship was the pivotal, if not sole factor leading to the respondents' decision to dismiss her. Nevertheless, there remains the question of whether it constituted the sole factor. This question arises because that same letter also contained references to Ms. Garrod's marriage, separation and divorce, to her conduct being in flagrant conflict with Christian ethics and morals, and to her class discussion on October 6th. "In view of all the above," as the letter then put it, "and in particular in view of your admitted adulterous relationship which you refuse to give up, the Board has no alternative but to terminate your contract" (see: Ex. 13). Without more, it would certainly seem as if Ms. Garrod's common law relationship was not the only factor influencing the school board's decision to dismiss her.

Even if other factors were involved, however, they would not necessarily preclude a finding of discrimination. A long line of human rights decisions have held that the discriminatory factor, if that is what Ms. Garrod's common law relationship turns out to be, need not be the only factor, nor need it even be the major or main factor (see: Beatrice Vizkelety, Proving Discrimination in Canada (Carswell, 1987), pp.79-80 esp. at ftnt.78 and p.195).

Rather, it is sufficient that it be what Vizkelety has referred to as an "operative element," or alternatively what several Boards of Inquiry chairmen have called a "material element" in the impugned decision (see: Elaine McAra v. Motor Coach Industries and Jeff Constance, unreported decision, 18 February 1988, by Chairman Simmons citing Patricia Whitehead v. Servodyne Canada Ltd. and Kevin Dooling (1986) 8 C.H.R.R. D/3874 where Chairman Soberman stated:

> 30682 Discrimination based on sex, prohibited by section 4(1) of the Human Rights Code, need not be the sole nor even the dominant factor in the treatment of a complainant. It is enough that sexual discrimination was a material element in the decision to dismiss and the evidence here establishes that it was ...).

This approach was also approved by the courts in the labour relations context (see: Regina v. Bushnell Communications Limited (1973), 45 D.L.R.(3d) 218 (O.H.C.) per Hughes J. at p.223, aff'd. (1974), 4 O.R.(2d) 288 (Ont.C.A.) per Evans JA. at p.290).

Therefore, even were I not minded to do so, it would be difficult if not impossible for me to avoid coming to the conclusion that Ms. Garrod's common law relationship was an operative or material element in her dismissal. The statement in the board's letter of October 15th - "and in particular in view of your admitted adulterous relationship ... the Board ... terminate your contract" - says it all, and in the respondents' own words.

However, I have also concluded that the facts as a whole simply do not sustain the claim that the respondents were influenced in their decision to dismiss Ms. Garrod by any of the other factors mentioned in the letter of October 15th. In the first place, Mr. Bangma explicitly denied that Ms. Garrod's separation and divorce were factors in her dismissal (see: Transcript, vol. II, p.230). Moreover, the significance of his denial was recognized by counsel for the Commission when she proceeded to amend the complaint accordingly (see: Transcript, vol. II, p.357).

Secondly, although the respondents' evidence contains frequent references to the fact that they believed that Ms. Garrod's conduct was in flagrant conflict with Christian ethics and morals, they could only give this belief content by invoking the further fact of her common law relationship. So, for example, even when counsel for the respondents submitted that Ms. Garrod was dismissed not because of her common law relationship but rather because of her conduct as a role model in a Christian School, he was forced to fall back on the language of the former to explain why the latter was not acceptable (see: Transcript, vol. II. p. 336). Indeed, the incontrovertability of this linkage probably explains better than anything else why counsel did not bother to raise the possibility that this case might have been pursued, if at all, under the rubric of adverse effect, rather than direct, discrimination.

The final factor invoked in the letter of October 15th was the question of Ms. Garrod's sensitivity in the light of the class discussion on the 6th of October. However, any influence that this discussion might otherwise have had simply disappears in the face of its actual timing; the fact is that it did not take place until several days after Mr. Bangma had already initiated the process that ultimately culminated in Ms. Garrod's dismissal. While it may well have exacerbated the situation, depending on which version one accepts, this discussion did not create it; at best, it provided some additional support for continuing down the path that the board had already chosen.

Consequently, it seems to follow that as with the complainant's evidence, so too does the respondents' evidence clearly and repeatedly point to, and only to, Ms. Garrod's common law relationship as the basis for her dismissal. In summary, therefore, there is no question in my mind that when the evidence is taken as a whole, it consistently supports the finding that Ms. Garrod was dismissed from her position as a full-time teacher at Rhema Christian School primarily because she was living in a common law relationship.

## The Law

### III. Preliminary Matters

At the outset of the hearing, two preliminary matters were raised by counsel for the respondents. First, he said

that the respondents did not consent to the jurisdiction of the Board of Inquiry on the grounds that the subject matter of Ms. Garrod's complaint was not covered by the Human Rights Code. Secondly, he asked that the names of the two individual respondents be dropped from the proceedings because, in his words, their "conduct is accepted by the Society as being done properly within the authority and scope of their duties and functions for the organization" (see: Transcript, vol. I, p. 9). Counsel for the Commission resisted both requests. At that stage, I reserved on both of these matters until I had the opportunity to hear and consider the evidence that the parties intended to present.

On the first of these matters, counsel for the respondents submitted that the conduct that led to the complainant's dismissal did not raise the issue of her marital status, but rather her morality. As he then put it, "And morality is not the subject matter of the Code" (see: Transcript, vol. II, p. 174). In his argument, he relied on the decision of an Ontario Human Rights Commission Board of Inquiry in Blatt v Catholic Children's Aid Society (1980), 1 C.H.R.R. D/72.

The complainant in Blatt was a child care worker who was discharged on the same day that he was hired because in the interval he had disclosed that he was living in a common law relationship. The basis of his complaint was that in being discharged on account of his common law relationship, he had been discriminated against on the ground of marital

status. The respondent Catholic Children's Aid Society argued that it was the complainant's life style rather than his marital status that was the problem. The Board of Inquiry accepted the respondent's argument and dismissed the complaint.

However, as counsel for the Commission pointed out, when Blatt was decided in 1980 the Human Rights Code simply prohibited discrimination because of marital status without also defining it. Moreover, shortly after Blatt was decided the Human Rights Code was amended to include the definition of marital status now found in section 9(1)(g). As was noted above, that definition also makes explicit reference to "the status of living with a person of the opposite sex in a conjugal relationship outside marriage," a status that is more conventionally referred to as living in a common law relationship.

While acknowledging that the Human Rights Code had indeed been amended to include a definition of marital status, counsel for the respondents nevertheless submitted that I should still follow the decision in the Blatt case. According to his argument, "[w]hether or not common law was a marital status was not the core of the decision" in Blatt (see: Transcript, vol. II, p.352). In support of this argument counsel for the respondents quoted at length from the point in the Blatt decision where the chairman had said:

> On this issue the Board's view is that the termination of Mr. Blatt's brief appointment was not based on his 'marital status'. It was, as the -

> Society argued, based on a moral judgment about his 'life style' and while, as already indicated, the Board is not convinced that the complainant's 'life style' posed a greater impediment to his effective performance than other divergences from from Church principle, the Board must uphold the right of the Society to apply its own moral standard. The issue is not 'was the complainant capable of fulfilling the requirements of a child care worker' but 'was the complainant capable of fulfilling the requirements of a child care worker as conceived by an organization espousing a particular set of religious and moral principles (see: Blatt, p.D/73).

That said, however, it must also be acknowledged that the chairman of the Board of Inquiry in Blatt did not stop with the foregoing words. To the contrary, immediately thereafter he went on to say that:

> The Human Rights Code overrides moral judgments that are based on biased views about race, creed, colour, age, sex, marital status, nationality or place of origin where such judgments affect the individual's employment and accommodation rights. This is important social policy. Though an interference with freedom in one sense, it is also fundamental to any kind of equality of the individual and hence is essential to freedom in a higher sense (see: Blatt, p.D/73).

As I understand these additional words, the chairman in Blatt was directing himself to consider the provisions of the Human Rights Code not simply before, but even after, he had arrived at the conclusion that the conduct complained of constituted an issue of lifestyle or morality.

And, in fact, that is precisely what the chairman in Blatt proceeded to do. More specifically, he went on to advert to the provision in the Human Rights Code about marital status and considered what it might mean, given that it was "not more fully defined in the Code, nor in any other statute, nor the common law. A dictionary adds little ..."

(see: Blatt, p.D/73). Ultimately he decided that marital status must refer to only two conditions: "One either was married or one was not" (see: Blatt, p.D/73). Then, and only then, did he proceed to assess the facts from this viewpoint, finally concluding that:

> The key to the Society's objection was not that Mr. Blatt was married nor that Mr. Blatt was single, by any legal definition of the terms, but that he was living with a woman other than his wife. In the Board's view this is an issue of 'life style' or sexual morality, not an issue of marital status (see: Blatt, p.D/73).

By contrast, however, when I begin as the chairman in Blatt did, that is, by considering the provisions that refer to marital status in the Human Rights Code, I am confronted not only with a statutory definition of marital status but also with one that makes explicit reference to common law relationships. Unlike the chairman in Blatt, therefore, I simply am not free to speculate, let alone decide, that marital status must refer to only two conditions or indeed to the two conditions which he set out, namely, either being married or being single. Instead, I must take my lead from the existence, words and meaning of the statutory definition. My task is to consider whether, and if so how, that statutory definition applies to the facts in Ms. Garrod's situation as they were given in the evidence before me. In so doing, moreover, I do not need to reach the submission that counsel for the Commission made about the limited extent to which the lifestyle issue is raised by the

reference to common law relationships in the Human Rights Code (see: Transcript, vol. II, p.360).

Indeed, my decision to consider whether the statutory definition is applicable to the facts is reinforced, albeit clearly unintentionally, by the further argument that counsel for the respondents made about the facts in Ms. Garrod's situation being stronger than those in Mr. Blatt's. According to this argument, given that Mr. Blatt's complaint was dismissed when he was simply living in a common law relationship while not also married, Ms. Garrod's complaint has an even more compelling basis for dismissal since she was not only living in a common law relationship but also still married to someone else (see: Transcript, vol. II, pp.176-8). As I understand this argument, however, it relies on a form of common law relationship "plus" reasoning that breaks down when the "plus" is examined and stands revealed for what it really represents, namely, Ms. Garrod's actual married condition. Since marriage clearly falls within any definition of marital status, even the most restrictive of definitions such as was set out in Blatt, in effect this argument simply serves as yet another way of invoking the provisions of the Human Rights Code which, in turn, brings me full circle back to my task of determining whether these provisions govern the facts of Ms. Garrod's situation.

In passing, I must also observe that to the extent that the respondents relied on Ms. Garrod's married condition together with her common law relationship as their grounds

for dismissing her, they made it very difficult, if not impossible, to bring themselves within the facts, and hence the outcome, of the Blatt case. In Blatt, the facts were such as to enable the chairman of the Board of Inquiry to say of the respondent Catholic Children's Aid Society, as has already been noted above, "the Society's objection was not that Mr. Blatt was married ..." (see: Blatt, p.D/73). Now, since I cannot say that of the respondents in Ms. Garrod's situation for the simple reason that they did rely on her married condition, albeit her marriage plus as it were, as the basis for their decision to dismiss her, then without more I am obviously not free, even were I inclined to ignore the statutory requirements, to adopt the finding in Blatt and to hold that the issue is one of morality and not of marital status.

At this point, I think that it bears stating that, in rejecting the respondents' first preliminary objection, I do not mean to suggest that the provisions of the Human Rights Code should be perceived as supporting or even encouraging the existence of extra-marital relationships or what is sometimes referred to as "adultery" (see: Ex. 13). To the contrary, the most that can be said of section 9(1)(g) of the Human Rights Code is that when it is taken in combination with section 4 the effect is simply to make the fact of extra-marital relationships, or adultery, irrelevant to employment decisions.

Counsel for the respondents also raised a second preliminary matter when he asked that the two individual respondents be dropped from the proceedings. In support of this request, he submitted "that as the corporate entity, the school society is ultimately the responsible entity, it will not be taking the position ... at any time in this inquiry, or any time hereafter, that the actions of either the president Mr. Bangma, or the principal Mr. Hendriks, were not within the full scope of their authority" (see: Transcript, vol. I, p.9). Counsel for the Commission was amenable to the larger corporate respondent accepting responsibility for the acts of the individual respondents; but she argued that this did not resolve the question of whether the respondent Rhema Christian School was a corporation able to accept legal liability (see: Transcript, vol. I, p.10).

In response, counsel for the respondents - quite rightly, in my opinion - argued that "I don't think it should ever lie in my mouth, as representing the complainant [sic], that the onus should be on me to prove that the complainant [sic] is in existence" (see: Transcript, vol. I, p.11). This argument notwithstanding, however, he stated "that the Peterborough Christian School is a corporate entity" (see: Transcript, vol. I, p.11) and pointed out "that the Ontario Human Rights Commission was advised on April 4th of 1987 ... in writing - that the complaint can only be properly responded to by the Peterborough Christian

School Society, which is the corporation that operates Rhema Christian School" (see: Transcript, vol. I, pp.12-3). Not surprisingly, he concluded this argument with a formal objection, saying "that this is an abuse of its considerable power by the province, and the Commission" (see: Transcript, vol. I, p.12).

I have considerable sympathy for the respondents' position on this issue, as I have already indicated. However, it would not be proper for me to indulge this sympathy because, as counsel for the Commission pointed out at the hearing, section 38(2)(d) of the Human Rights Code includes the provision that: "The parties to a proceeding before a board of inquiry are, ... any person appearing to the board of inquiry to have infringed the right" (see: Transcript, vol. I, p.12). Under these circumstances, I accepted the argument made by counsel for the Commission to the effect that the parties should remain as named, at least until the completion of the evidence when, if the complaint were indeed established, it would be consistent with section 38 to make an order stating who had infringed the right (see: Transcript, vol. I, p.12-3).

Counsel returned to this issue at the beginning of the respondents' case when counsel for the Commission sought, and counsel for the respondents opposed, an order excluding witnesses (see: Transcript, vol. II, pp.182-4). However, counsel for the Commission acknowledged that parties should not be excluded (see: Transcript, vol. II, p.185); and both

counsel appeared to be in agreement that the respondents' witnesses either were, or included, individuals whose status as parties was in question depending on whether the complaint was more properly directed against the named but unorganized respondent or the corporate entity behind it (see: Transcript, vol. II, pp.184-8). Accordingly, I agreed to the exclusion of any witnesses who were not, or might not become, parties (see: Transcript, vol. II, p.188). Then, when counsel for the respondents requested a ruling on who the parties were, I referred to section 38 of the Human Rights Code as I had done when this issue was first raised and again reserved on this issue until I had the opportunity to hear and consider all of the evidence that counsel intended to present (see: Transcript, vol. II, pp.188-90). Moreover, since this issue does not need to be resolved unless the complaint is upheld, at this stage it seems more appropriate to move to a consideration of the substantive concerns raised by Ms. Garrod's complaint.

IV. The Law As Applied To The Evidence

A. The Statutory Framework

The statutory provisions relied on in this matter are sections 4(1), 8, 9(1)(g), 23(a) and (b), and 40 of the Human Rights Code.

According to section 4(1) "Every person has a right to equal treatment with respect to employment without discrimination because of ... marital status ...." Section 8

provides that "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part;" and section 9(1)(g) provides that "'marital status' means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage."

There was some confusion at the hearing about the provisions of section 23. Section 23 was amended in 1986 prior to the 20 February 1987 filing date of Ms. Garrod's complaint. However, subsequent to the hearing, it became clear that these 1986 amendments were not proclaimed into force until 18 April 1988, that is, well after the date on which Ms. Garrod's complaint was filed. Accordingly, the pre-1986 amendment provisions governed this matter; and they are as follows:

> Section 23. The right under section 4 to equal treatment with respect to employment is not infringed where,
>
> (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their ... creed ... employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment;
>
> (b) the discrimination in employment is for reasons of ... marital status if the ... marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment; ....

Finally, section 40 of the Human Rights Code provides that if a right has been infringed in contravention of section 8, the board of inquiry may:

> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

B. The Issues

In the order in which I intend to deal with them, this complaint raises the following substantive issues:

1. The Right: Equal Treatment With Respect to Employment Without Discrimination Because of Marital Status

   Did the complainant's dismissal on the grounds of her common law relationship constitute discrimination because of marital status as that term is defined in the Human Rights Code?

2. The Exceptions For Special Employment:

   (a) Creed: A Reasonable and Bona Fide Qualification

   If so, is this a situation where a religious or educational institution or organization that is primarily engaged in serving the interests of persons identified by their creed employs only, or gives preference in employment to, persons similarly

identified; and, if so, is the qualification a reasonable and bona fide qualification because of the nature of the employment?

(b) Marital Status: A Reasonable and Bona Fide Qualification

Or, can it be said that marital status is a reasonable and bona fide qualification because of the nature of the employment?

3. The Proper Parties

If the responses to 2 (a) and (b) are negative, was the complainant's right to equal treatment in employment without discrimination because of marital status infringed by the respondents and/or by another party who might properly be added at this stage of the proceedings?

1. The Right To Equal Treatment With Respect To Employment Without Discrimination Because Of Marital Status

Although Ms. Garrod's complaint of marital status discrimination was initially based both on her common law relationship and on her divorce (see: Ex. 2), counsel for the Commission withdrew the latter allegation after hearing Mr. Bangma's evidence (see: Transcript, vol. II, p.357). Thus, what remains is to determine whether Ms. Garrod's common law relationship falls within the meaning of marital status as it is defined in the Human Rights Code. Although it seems self-evident that it does, as counsel for the

Commission argued (see: Transcript, vol. II, pp.172-3 and 356-8), nevertheless counsel for the respondents resisted this submission (see: Transcript, vol. II, pp.174-9, and 334-7).

Now, some of the arguments that counsel for the respondents made on this point simply involved denying that Ms. Garrod was dismissed because of her common law relationship. In other words, they invclved the facts and, as such, have have already been examined and, given the weight of the evidence to the contrary, rejected. However, counsel for the respondents also made two arguments that challenged the interpretation of section 9(1)(g). First, he contended that if "two marital stati (sic) can exist in one person at the same time, it's an impossible situation to defend oneself against" (see: Transcript, vol. II, p.334); and then, he argued for a different interpretion of section 9(1)(g), one according to which "living common law while still officially married to somebody else ... simply is not acceptable conduct, and no matter who does that, whether it's a Christian school society or a public school or a Roman Catholic school, ... that would be a legitimate dismissal in any circumstances" (see: Transcript, vol. II, p.336).

Initially, I was hard pressed to understand why counsel made his first argument, given that any legislature that was serious about protecting human rights might well find the defencelessness of perpetrators appealing. Upon reflection,

however, it struck me that this first argument was offered less for what it actually said than for its potential to rebut what would otherwise be perceived as the plain meaning of section 9(1)(g). Moreover, counsel for the respondents had an excellent reason for wanting to exclude the "plain meaning" of section 9(1)(g). Absent such an exclusion, he could not justify invoking the "golden rule" of statutory interpretation; and absent this "golden rule," in turn, he could not sustain his second argument for a different interpretion of section 9(1)(g).

In effect if not explicitly, therefore, counsel for the respondents opted not only to disagree with the more inclusive interpretation of section 9(1)(g), but also to challenge the way in which counsel for the Commission had derived that interpretation. As far as I have been able to ascertain, neither of these arguments has as yet been resolved by the courts; nor would it appear that they have even been argued before any other boards of inquiry. However, this should not be particularly surprising given how recently section 9(1)(g) was enacted. In fact, even prohibiting marital status discrimination in employment is itself a relatively recent phenomenon. Under these circumstances, it would seem to be appropriate to begin by setting out some of this background, albeit very briefly, before proceeding to consider these two arguments themselves.

The history of human rights legislation in Canada begins at least as early as 1793 when the province of Upper Canada passed a statute entitled " An Act to prevent the further introduction of slaves and to limit the term of Enforced Servitude within this Province" (see: W. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada," [1968] 46 C.B.R. p.565 at 567). Despite this auspicious beginning, however, another one hundred and sixty-nine years were to elapse before the first general human rights legislation, known as the Ontario Human Rights Code, was proclaimed in force in Ontario on June 15th, 1962. Although the 1962 Code did not make any reference to marital status, the situation had changed by June 15th, 1982 when the present Human Rights Code was enacted.

Judith Keene has argued that the 1982 Code "is not an amendment, but a completely new legislative scheme" (see: Human Rights in Ontario (Carswell, 1983), p.1). According to Keene, what is notable about the change of approach associated with the 1982 Code is that "[t]he basic rights set out in Part I are explicitly stated, rather than left to be inferred from a series of prohibitions" (see: Human Rights in Ontario, p.11). The significance of this is twofold. In the first place, it underlines "the importance of the provisions of Part I" (see: Human Rights in Ontario, p.11). And, in the second place, it suggests "that these provisions are to be given a liberal interpretation" (see:

Human Rights in Ontario, p.11). I am persuaded by Keene's argument. Thus it follows that I intend to give the marital status provision, which is set out in Part I of the 1982 Code, a liberal interpretation. In so doing, moreover, I am reinforced by section 10 of the Interpretation Act (see: R.S.O. 1980, c. 219) which provides:

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

That said, nevertheless it is worth noting that the history of the marital status provision actually begins before the enactment of the 1982 Code. In fact, it begins between 1971 and 1979 when Alberta became the first jurisdiction in Canada and Saskatchewan, the last, to include marital status as one of the legislatively prohibited grounds of discrimination in employment (see: Tarnopolsky and Pentney, Discrimination and the Law (De Boo, 1985), p.9:1). As a consequence, in 1972, when Ontario decided to include not only age and sex but also marital status as prohibited forms of discrimination, this put the province among the first of these jurisdictions to do so.

Despite their recentness, such enactments still put Canada ahead of the United States and the United Kingdom, neither of which has as yet passed any legislation that prohibits discrimination on the basis of marital status as

such (see: Tarnopolsky and Pentney, Discrimination and the Law, p.9:3). While it would be very interesting to consider how and why this has come to be, for the purposes of this matter it suffices to note that all three of these countries do indeed have some experience with marital status litigation. Still, the overall number of these cases is very low, particularly when contrasted with the number of cases that have alleged sex or race discrimination (see: Tarnopolsky and Pentney, Discrimination and the Law, p.9:3).

Perhaps this explains why, by 1987 when the complaint in this matter was filed, Saskatchewan and Ontario were the only jurisdictions that had not only prohibited marital status discrimination but also provided written definitions of their respective provisions (see: Tarnopolsky and Pentney, Discrimination and the Law, p.9:2). Although there are only two such definitions, however, they really are quite distinctive. In the first place, they are differently sited, with Saskatchewan's definition being contained in a regulation while Ontario's is found in the Human Rights Code itself; and, more importantly, their content is different. Indeed this is so, even absent the issue of common law relationships. That is to say, even though both jurisdictions define marital status in terms of of being married, widowed, single, divorced or separated, only Saskatchewan goes further, explicitly including the "state of being engaged to be married" and explicitly excluding "discrimination on the basis of a relationship with a

particular person." Obviously these differences, or at least the latter, are not insignificant; perhaps they even lend some credence to the proposition that there is more than one way to define marital status.

However the validity of that proposition is not my concern here; rather, my task is to focus on common law relationships and how they feature in the definition of marital status in Ontario. In my opinion, this is best done by continuing to compare the two existing definitions of marital status as they were adopted in Saskatchewan and in Ontario. Partly this is because it is possible to state absolutely categorically that both definitions do indeed include common law relationships, although only Saskatchewan refers to them as such. Their similarities notwithstanding, mostly it is because Saskatchewan and Ontario also opted for considerably different, some would perhaps even say oppositional, ways of actually incorporating common law relationships into their respective definitions. They differ, in other words, in a way that is pertinent to the respondents' first argument.

Not to put this difference too finely, when it comes to meanings that are plain, at least comparatively speaking, Saskatchewan's definition makes it much easier to argue against ascribing more than one marital status to any one person at any one point in time. This is so simply because Saskatchewan has employed the disjunctive word "or" to link common law relationships to the other categories that are

specifically set out in that province's definition of marital status. By contrast, in Ontario the clause denoting common law relationships is joined to the other categories by the conjunctive word "and;" moreover, it is further linked, perhaps even redundantly so, by the word "includes," a word that also clearly serves only a conjunctive function. In Ontario, therefore, when the legislation is given its face value it plainly contemplates the very real possibility of assigning more that one marital status to a person at a single point in time. Now, irrespective of whether this actually turns out to be the case or not, the fact remains that this distinction can be identified; and that, in and of itself, is sufficient to make it eminently reasonable for counsel for the respondents to question the interpretation of section 9(1)(g).

However, much to his credit counsel for the respondents did not even pause at the simple question of whether the meaning of section 9(1)(g) was plain. To the contrary, his first argument was that the plain meaning of this section could not be such as to render respondents defenceless. He argued, in other words, that there is a right and a wrong way of including common law relationships in the definition of marital status. It is under these circumstances, therefore, that his first argument could only have been strengthened by referring to Saskatchewan's definition. Perhaps such an approach would even have enticed counsel for

the Commission, whose efforts were otherwise very able, into addressing this particular argument.

That said, nevertheless, there are three very good reasons for finding, as I do, that the plain meaning or more inclusive approach - wherein a complainant may well have more than one marital status at any one point in time - can withstand the challenge that it renders respondents defenceless. First, and perhaps foremost, this is the approach that is the most consistent with the legislative history of the section as we know it in Ontario, the ostensibly plain meaning of Saskatchewan's definition notwithstanding. Second, while it must be acknowledged that the plain meaning or more inclusive approach does curtail some defences, one need only review the explicitly stated purpose of human rights legislation in Ontario to know why this must be so. Finally, while in the best of all worlds, should that ever come to pass, no respondent would be completely defenceless; nevertheless, even in today's less than perfect world, there still are some specific defences that are available to variously qualified respondents. Now, I must explain, albeit briefly, each of these reasons in turn.

First, given the legislative history of section 9(1)(g), it is not possible to restrict a complainant who has alleged discrimination on the basis of a common law relationship to only one marital status category simply because of the conditions that already obtained when these

relationships were first included within the purview of the definition of marital status. At that time, the pre-existing marital status categories were: married, widowed, separated, divorced or single. As such, these categories not only comprehended all of the recognized states of marital status, absent only common law relationships, but also had the potential to overlap. Accordingly, when the decision was made to include common law relationships, whether dis- or con-junctively, without making any changes to the previously listed categories, that became in effect a decision to continue to tolerate the potential for overlap between and even among the previously listed categories. Put simply, absent any change in the original categories, a complainant will inevitably fall within the reach of at least one of them while also living in an common law relationship. For example, just as Ms. Garrod was not only living common law, but also married (and, during the crucial time period, separated if not divorced), so too was Mr. Blatt not only living common law but also, as the facts would appear to have it, unmarried or single.

Still, it is at least conceivable that the legislation might impose an artifice, that is, it might direct that a choice must be made between, or among, these categories, the reality of overlap notwithstanding. In fact, this possibility certainly seemed to engage counsel during their argument at the hearing. However, their dispute over which marital status box Ms. Garrod would have to tick off on her

income tax, or indeed on any other, form was neither compelling, nor even particularly enlightening (see: Transcript, vol. II, pp.334-5 and 357-8). In effect, they flatly disagreed over whether she would have more than one choice of category, as well as over whether that choice was externally mandated or the result of self-selection. Nevertheless, what their disagreement makes starkly clear is that, in the absence of explicitly worded directives, such choices are completely arbitrary and certainly could only be second-guessed by adjudicative agencies such as tribunals or courts.

Now, it is easy to understand why respondents might wish it were otherwise. The more choices complainants have to make, the more likelihood that they will make mistakes, which is the same thing as saying, the more defences that thereby become available to respondents. In fact, counsel exemplified this reasoning at one point in his argument by contending that the only marital status that Ms. Garrod could claim was that of being married (see: Transcript, vol. II, p.334). That said, then he went on to argue that, absent any evidence that she was dismissed because she was married, the case against the respondents could not succeed (see: Transcript, vol. II, p.335). If I had been willing to sustain this reasoning, it would only have been at the cost of completely ignoring three undeniable facts, namely, that both parties frequently referred to Ms. Garrod as living in a common law relationship, that both agreed that

relationship led to her dismissal and, finally, that discrimination in employment on the basis of the marital status known as living in a common law relationship is prohibited by the Human Rights Code.

In effect, the reasoning underlying the foregoing argument is not just that respondents must have a range of defences available. Rather, it is that all conceivable defences, irrespective of whether they are prompted by substantively justifiable concerns or simply by procedural niceties, must always be available to those who have to respond to human rights complaints. Now, to the extent that the foregoing reasoning is ever justifiable, it is probably so mainly in association with the long-standing convention in Anglo-American criminal law whereby an accused has the right to be perceived as innocent until proven guilty. Even in the context of the criminal law, however, our elected representatives sometimes decide to curtail the range of defences available to accused persons, thereby effectively limiting their right to rely on any and every conceivable defence. Under these circumstances, therefore, it should not be surprising to learn that our elected legislators have also chosen to delimit the range of defences available to those who must respond to human rights complaints.

That this is so seems obvious from the purpose of Ontario's human rights legislation - which brings me, in turn, to the second reason for finding that the plain meaning or more inclusive approach to section 9(1)(g) can

withstand the challenge that it renders respondents defenceless. That purpose, which is set out in the preamble to the Human Rights Code, includes the following statement:

> it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

Insofar as it refers to the dignity and worth of "every" or "each" person, this preamble must be read as evincing at least as much concern for the effects of discriminatory practices on victims as for the rights of those who are alleged to have perpetrated these unacceptable practices.

At a minimum, in other words, the preamble to the Human Rights Code calls for an evenhanded approach that takes account of the rights of both parties. In so doing, the legislators have clearly rejected any approach that simply extends a protective blanket to respondents without addressing the consequences that may ensue for victims. To the contrary, the Human Rights Code must be construed as an important part of the process of enabling the victims of discrimination to reassert their own dignity. Accordingly, it should not be surprising that this would also entail the curtailment of some of the more simplistic procedural defences that might otherwise have been available to respondents.

Lest the foregoing seem unduly harsh, let me make it clear that I am not trying to suggest that the Human Rights Code should be interpreted as depriving respondents, whether in the context of this case or any other, of all possible defences. To the contrary, in this case as in many others, there are various statutorily defined defences available to respondents, which brings me to my third and final reason for upholding the plain meaning or more inclusive approach to section 9(1)(g). Pragmatically speaking, it simply is not true, contrary to what counsel for the respondents argued, that allowing a complainant to be characterized by more than one marital status necessarily renders respondents somehow defenceless. In the first place, respondents can always deny, if indeed it is the case, that marital status played any role in their conduct. More importantly, however, some respondents, including those in the circumstances before me, will always be able to avail themselves of the opportunities that are presented by the statutorily defined defences set out in sections 13 to 21 and 23, as well as in certain subsections of sections 10, 12, 22, and 24 of the Human Rights Code. It should be emphasized that these defences are neither quantitatively nor qualitatively insignificant.

In summary, therefore, the history, purpose, and pragmatic effect of the Human Rights Code all combine to conclusively defeat the argument advanced by counsel for the respondents against the plain meaning or more inclusive approach to section 9(1)(g). Recognizing that complainants

can indeed have more than one marital status at one and the same time does not have to mean that respondents are thereby rendered defenceless.

That said, moreover, it then also follows that I am unable to entertain the second argument offered by counsel for the respondents wherein he contended for a new and different meaning for section 9(1)(g). Such an argument could only take hold, if at all, if there were an interpretive vacuum, that is, when there is no plain meaning that can be attributed to the legislation in question. Since I have found that that is not the case with respect to section 9(1)(g) of the Human Rights Code, that is the end of the matter. It should, of course, be some consolation to counsel for the respondents to recognize that while his argument for re-interpreting section 9(1)(g) fails, it nevertheless approximates what is ultimately achieved when the rights that are defined in sections 4 and 9(1)(g) are qualified by the exceptions that are set out in section 23.

Having disposed of the respondents' arguments about the meaning of section 9(1)(g), what remains is to re-affirm my finding of fact that Ms. Garrod was dismissed on the grounds of her common law relationship and then to confirm that I find that her dismissal did indeed constitute a *prima facie* case of direct discrimination because of marital status as defined in sections 4 and 9(1)(g) of the Human Rights Code. Under these circumstances, it follows that I must deny the respondents' application for a nonsuit (see: Transcript,

vol. II, pp.172-81), a matter on which I had reserved judgment at the hearing (see: Transcript, vol. II, p. 181-2). It also follows that section 8 of the Human Rights Code has been contravened.

2. The Exceptions For Special Employment

The foregoing does not end the matter because, as Beatrice Vizkelety has observed, "[a]nti-discrimination provisions are rarely absolute: they are frequently tempered by an assortment of exceptions and exemptions which, depending on the circumstances, may limit a respondent's liability" (see: Proving Discrimination in Canada, p.195). In Ontario, these are found in Part II of the Human Rights Code which contains at least fifteen distinct provisions that set out statutory exceptions to the rights found in Part I (see: Judith Keene, Human Rights in Ontario, ch. 6). Now, insofar as we already know that these Part I rights must be given a large and liberal interpretation, it follows that the first issue to be resolved is whether the same is also true of the various statutorily defined exceptions in Part II and more particularly, of sections 23(a) and (b), the two special employment provisions relied upon by the respondents in this matter.

Unfortunately counsel did not argue this point before me. Perhaps they thought that the Supreme Court of Canada had already resolved it. After all, speaking for the Court

in Ontario Human Rights Commission et al. v. Borough of Etobicoke, McIntyre J. held that "under the Code non-discrimination is the rule of general application and discrimination, where permitted, is the exception" (see: [1982] 1 S.C.R. p.202 at 208). Not surprisingly, this statement has been interpreted by most commentators as supporting the principle that the statutory exceptions should be narrowly construed (see: Judith Keene, Human Rights in Ontario, p.149; Tarnopolsky and Pentney, Discrimination and the Law, pp.42 and 91-2; Beatrice Vizkelety, Proving Discrimination in Canada, p.196; and, albeit tacitly, R. Juriansz, "Recent Developments in Canadian Law: Anti-Discrimination Law," [1987] 19 Ottawa L. Rev. p.447 and p.667 at 705). In reality, however, this interpretation has not been consistently adhered to - not even by these selfsame commentators.

For her part, Judith Keene not only "divided [the statutory exceptions] into two categories: those that expand the rights of protected groups, and those that constrict those rights"; as well she argued that "[i]t seems reasonable to assume that the rule of narrow construction of exceptions will be applied only to the latter category (see: Human Rights in Ontario, p.149). Similarly Juriansz also adopted broad categories, relying on Madame Justice Wilson's distinction between defences and definitional exceptions (see: Bhinder v. CNR [1985] 2 S.C.R. 561) and then arguing for a large and liberal interpretation of the latter (see:

"Recent Developments ... Anti-Discrimination Law," p.455). By contrast when Tarnopolsky and Pentney argued for what they referred to as "balancing" (by which they meant the more liberal) interpretation, they singled out only sex-based privacy, and perhaps foetal safety for such treatment (see: Discrimination and the Law, pp.45, 47 and 49-50). Likewise Beatrice Vizkelety opted for a much more limited category of exemptions that might not require restrictive interpretation, although she differed from the others insofar as she alone contended that "exemptions in favour of nonprofit organizations with a religious purpose, might not necessarily fall within the ambit of the rule [of restrictive interpretation]" (see: Proving Discrimination in Canada, p.196-7).

Clearly Vizkelety's argument merits closer examination, partly because she may have intended it to encompass section 23(a) of the Ontario Code and partly because she supported it by relying on a case in which the facts were similar to those before me. That case, Caldwell v. St. Thomas Aquinas High School, [1984] 2 S.C.R. 603, originated in British Columbia when a Catholic school board refused to continue to employ a Catholic teacher because she had contravened two rules of the Church by marrying a divorced man in a civil ceremony. The teacher, Margaret Caldwell, complained of discrimination on the basis of marital status and religion contrary to section 8 of the British Columbia Human Rights Code. Although her claim was supported by the Director of

the Human Rights Code of British Columbia, she lost when the Supreme Court of Canada ruled that the school board's refusal was defensible under sections 8 and 22 of that Code. For the moment, however, what matters is that the latter provision is similar to section 23(a) of the Ontario Code.

Indeed, section 22 of the British Columbia Code provided that:

> 22. Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons (see: Caldwell, p.627).

Accordingly it may well be relevant to the interpretative issue before me that, in deciding Caldwell, Mr. Justice McIntyre held:

> "It is therefore my opinion that the Courts should not in construing section 22 consider it merely as a limiting section deserving of a narrow construction" (see: Caldwell, p.626).

Without more, nevertheless, it is not self-evident that I must follow Vizkelety's argument and apply his ruling to the interpretation of section 23(a) of the Ontario Code. What constrains me is the claim made by some other commentators who maintain that section 22 of the British Columbia Code must be construed as a "unique" provision (see: Tarnopolsky and Pentney, Discrimination and the Law, pp.6-51, 6-53, and 6-56).

Fortunately this has not remained simply an academic controversy. To the contrary the Supreme Court of Canada addressed it recently in a case involving a municipality that had relied on an anti-nepotism policy to deny summer employment as a lifeguard to an applicant, Line Laurin, whose mother worked as a full-time typist at the municipal police station (see: Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279). In the Brossard case, not only was Ms. Laurin successful when she lodged a complaint of discrimination on the basis of civil status contrary to section 10 of the Quebec Charter of Human Rights and Freedoms (see: R.S.Q. 1977, c. C-12); as well the Court denied the municipality the protection of section 20 of the Quebec Charter, the second branch of which provided:

> 20. A distinction, exclusion or preference ... justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory (see: Brossard, p.319).

Clearly the wording of this provision has the potential to raise - and in fact did raise - some of the same issues as were addressed by the Caldwell Court in the context of interpreting section 22 of the British Columbia Code.

In Brossard, the majority opinion was rendered by Mr. Justice Beetz who held that section 20

> was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the individual in specific circumstances (see: Brossard, p.324).

More importantly he also decided that the same policy underlay section 22 of the British Columbia Human Rights Code (see: Brossard, p.332), as well as sections 17 and 23 of the Ontario Human Rights Code (see: Brossard, p.336). That said, it was not surprising when he concluded his analysis of these four provisions by referring to them collectively as the "group rights" exceptions (see: Brossard, p.336). Thus the controversy, such as it was, about the uniqueness of section 22 of the British Columbia Code was resolved.

From the perspective of the matter before me, however, the relevance of the Brossard decision derives more from the fact that both counsel made explicit submissions concerning the appropriate rule of construction for the "group rights" exception in the Quebec Charter. On the one hand, Commission counsel argued that section 20 should be interpreted restrictively while, on the other hand, counsel for the municipality argued to the contrary (see: Brossard, p.321). Thus it was somewhat surprising when Mr. Justice Beetz refused to countenance either argument. In his words:

> Rather than adopting a liberal or a restrictive interpretation of the second branch, I shall therefore endeavour to give the expressions "non-profit institution" and "political nature" their ordinary meaning, using the traditional rules of statutory interpretation (see: Brossard v. Quebec 324).

Needless to say, Mr. Justice Beetz' rejection of liberal interpretation seems at first glance inconsistent with the spirit, albeit certainly not with the words, of the Caldwell

decision. Of course, all things considered, that does not make his preference for the "ordinary meaning" of these "group rights" exceptions any the less binding on me.

Under these circumstances, however, it would not be appropriate to conclude the search for a judicially sanctioned rule of construction for these "group rights" exceptions without referring to a correlative concern that was raised by Beatrice Vizkelety in the aftermath of the Caldwell decision. While still in the course of reflecting on whether non-discrimination remained the rule of general application as stated in Etobicoke, she suggested that

> Caldwell ... need not be interpreted as conferring unfettered rights upon the protected group (see: Proving Discrimination in Canada, p.199).

To support this claim she explained that, in Caldwell, the Court had

> identified equality as a competing legal right not one that is in any way inferior to the rights of the religious group (see: Proving Discrimination in Canada, p.199).

In fact, Mr. Justice McIntyre's decision in Caldwell had begun in precisely this fashion by stating, *inter alia*, that

> A broader issue may be said to arise concerning a conflict between two legally established rights, that of the individual to freedom from discrimination in employment, and that of a religious group to carry on its activities in the operation of its denominational school according to its religious beliefs and practices (see: Caldwell, p.606)

Moreover later in his decision he reiterated this same theme

> To begin with it must be recognized that we are here facing a situation where there is a clear conflict between two sound legal positions. There is an

> assertion by each party of a clear legal right and the two rights, if each is to be accepted with no modification or limitation, are incompatible. The respondent is lawfully entitled to create and to operate a denominational school according to Roman Catholic concepts of education .... On the other hand, the law of the land has conferred rights regarding employment which have come into conflict with the rights of the respondent in the operation of its denominational school' (see: Caldwell, p.625-6).

Nor was Beatrice Vizkelety alone in expressing this concern; Tarnopolsky and Pentney also shared it and tried to illustrate it even more graphically by posing a rhetorical question, to wit:

> One may question whether ... the B.C. exemption could be used to shield a religious school (for example) from a complaint of discrimination on the basis of sex if it chose to hire only male teachers of the particular religion (see: Discrimination and the Law, p.6:56).

While there was some optimism that the Supreme Court of Canada might shed some light on this concern when the Brossard case was heard, the Court did otherwise, relying on other grounds to deny the protection of the "group rights" exemption to the Quebec municipality. Thus this issue remains unresolved, albeit potentially relevant to the matter before me.

Accordingly, I want to clarify from the outset how I would deal with it, were that to become necessary. First, as required by the Etobicoke decision, I have already given a large and liberal interpretation to the meaning of "marital status" because it constituted the statutory basis for the complainant's assertion of her right to non-discrimination in employment. Next I propose to apply the Brossard ruling

about seeking the "ordinary meaning, using the traditional rule of statutory interpretation" to the interpretation of the "creed" that the respondents must have in order to invoke the protection of section 23(a) of the Ontario Code. If the respondents meet this requirement as interpreted, however, then I will be confronted, as was the Court in Caldwell, by a conflict between "two legally established rights" (see: Caldwell, p.606).

Nevertheless there are three crucial differences between the conflict as it existed in the Caldwell context and that which is before me. The first involves the articulation of the complainants' rights; the second, the respondents' claims for exemptions; and the third, the different legislative frameworks available to resolve these competing rights based controversies. Moreover these three distinguishing features bulk large, at least collectively; without more, indeed, they preclude me from applying the Caldwell precedent directly to the matter before me. Accordingly, I want to explain each briefly.

First, since the complainant before me rested her claim specifically on marital status, I could be confronted by the conflict between two specific rights - that of marital status and that of a credal "group right". By contrast, in Caldwell the Court ascribed only a general, and never a specific, statutorily defined basis to Mrs. Caldwell's claim, all the while referring to the respondents' claim more specifically in terms of "religious conformance" (see:

Caldwell, p.623 and 624). At least at first glance, it would seem marginally easier to resolve a conflict that is expressed in terms of a general and a specific right (with the specific right receiving the edge, as actually happened in Caldwell), rather than one which is articulated in terms of two competing specific rights, such as that between marital status and religious conformity. Yet counsel never argued this before me, even though counsel for the Commission seemed on the verge of so doing at one point in her argument (see: Transcript, vol. II, p.323).

Second, the respondent school in Caldwell was not only denominationally Roman Catholic and hence better known than the nondenominational (or multidenominational) respondents before me but, more importantly, this meant that only the former could claim a form at least of conventionally, if not legally, recognized constitutional status. Again, tenuous though it was, that status certainly did not hinder, and more than likely reinforced, the relative strength of the respondents' claim in Caldwell. Although counsel for the respondents in the matter before me addressed this distinction, somewhat unexpectedly he did not try to refute it. Instead he contrasted what he saw as the more formally principled basis of Catholicism with the more practise-oriented beliefs of the various churches that were represented in Rhema Christian School (see: Transcript, vol. II, p.344).

The third and final feature that distinguishes the Caldwell decision from the matter before me are the differing legislative frameworks provided in the human rights codes of the respective provinces. More specifically, once it had been ascertained in Caldwell that the respondents met the religious (and not for profit) requirements set out in section 22 of the British Columbia Act, the legislation was exhausted. By contrast, in Ontario, were competing legal rights - marital status and religious conformance - to be established, one further statutory step would nevertheless remain. In effect, I would have to determine whether, in the circumstances, the claim for religious conformance could be "a reasonable and *bona fide* qualification" as set out in section 23(a) of the Ontario Code. If it were, the respondents' rights would prevail; if not, the complainant's right must be redressed.

The requirement of "a reasonable and *bona fide* qualification" (or b.f.o.q.) is, in short, a statutorily imposed tie-breaker. Although it was not available to the parties in Caldwell, it is available to the parties before me should it be necessary to resolve the conflict, if any, between the competing legally recognized rights of the complainant's marital status and the respondents' religious conformance. Furthermore, in the Etobicoke case, the Supreme Court of Canada ruled that a b.f.o.q. provision constituted a test with two components (which will be set out in some detail below). For now, however, what matters is that this

ruling obviates all interpretative questions. The b.f.o.q. set out in section 23(a) of the Ontario Code is, in other words, subject neither to restrictive nor to liberal interpretation, nor is its ordinary meaning of any discernible concern.

(a) Creed: A Reasonable and Bona Fide Qualification

From the foregoing, therefore, it seems obvious that any consideration of section 23(a), albeit not section 23(b), of the Ontario Code must begin by setting out and applying the "ordinary meaning, using the traditional rules of statutory interpretation" of the two criteria that the respondents must meet in order to invoke the protection of the section. Put formally, this means asking: (i) is Rhema Christian School "a religious ... [or] educational ... institution or organization"; and, if so, (ii) is the School "primarily engaged in serving the interests of persons identified by their ... creed". If and only if these two criteria are affirmed do we then proceed to a consideration of the third, or b.f.o.q., issue: (iii) is the School's claim to employ "only ... persons similarly identified" a qualification that "is a reasonable and *bona fide* qualification because of the nature of the employment." All three of these questions are, of course, governed by the procedural holdings in Etobicoke to the effect that:

> The only justification which can avail the employer ... is the proof, the burden of which lies on him, that [the qualification] ... is a *bona fide*

> occupational qualification .... The proof ... must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities (see: Etobicoke, p. 208).

On the first issue of whether Rhema Christian School constitutes a "religious ... [or] educational ... institution or organization", counsel for the Commission ultimately referred to it as a "religious institution" (see: Transcript, vol. II, p.309 and 313), while counsel for the respondents seemed to rely more on "education" as its distinguishing feature (see: Transcript, vol. II, p.345 and 351). Although the latter argument seemed marginally more consistent with the ordinary meaning of these words, when counsel for the Commission conceded that the School was a "religious institution" (see: Transcript, vol. II, p.313) there was no need to dwell any further on this divergence.

However, their initial positions may have rendered it more difficult for counsel to deal with the second issue of whether Rhema Christian School "is primarily engaged in serving the interests of persons identified by their ... creed." This is because, absent any definition of "creed" in the Ontario Code, commentators and boards of inquiry alike have tended to view "creed" and "religion" as "essentially synonymous" (see: Tarnopolsky and Pentney, Discrimination and the Law, p.6-1; Judith Keene, Human Rights in Ontario, p.56; Morley Rand v. Sealey Eastern Limited (1982), 3 C.H.R.R. p.D/938 at D/942; Dufour v. J. Roger Deschamps Comptable Agree, unreported: 15 February 1981, p.66). Yet ironically, in the matter before me neither counsel could

rely on this identity. Counsel for the Commission, having conceded the religious nature of Rhema Christian School, nevertheless made creed contentious; while by contrast, respondents' counsel's initial emphasis on the educational nature of the School meant that he had to contend, albeit affirmatively, with the creed requirement.

These contentions notwithstanding, the applicability of the ordinary meaning of the word "creed" was never really in doubt in the matter before me. Whichever definition of "creed" one relies on, whether

> **Creed**: 1. A brief summary of Christian doctrine. More generally: A confession of faith. 2. A professed system of religious belief; a set of opinions on any subject (see: The Shorter Oxford English Dictionary, third edition (Oxford: Clarendon Press, 1973), p.453),

or

> **Creed**: 1. any system, doctrine, or formula of religious belief, as of a denomination. 2. any system or codification of belief or of opinion (see: The Random House Dictionary of the English Language, second edition (New York: Random House, 1987), p.473),

or

> **Creed**. 1. a brief statement of religious belief; confession of faith. 2. a specific statement of this kind, accepted as authoritative by a church ... 3. a statement of belief, principles, or opinions on any subject (see: Webster's New World Dictionary, college edition (Toronto: Nelson, Foster & Scott, Ltd., 1957), p.346),

there are really only two basic issues. First, are the beliefs "religious"; and secondly, do they constitute a "system", or "doctrine", or "statement"?

The first of these questions may be more difficult to answer whenever the beliefs are not deistic, as was held for example by the English Court of Appeal in R. v. Registrar General; Ex Parte Segerdal, [1970] 2 Q.B. 697 where the court decided that the services of the Church of Scientology could not be considered "religious" worship, even though their philosophy was referred to as a "creed". As Judith Keene has pointed out, however, this "narrow interpretation of the term religious ... is not congruent with the approach taken by the Canadian courts" (see: Human Rights in Ontario, p.58). In turn, this led her to conclude "that members of the more recently established religions will be able to claim the protection of the Code" (see: Judith Keene, Human Rights in Ontario, p.61). Irrespective of whether her conclusion is borne out, the respondents in the matter before me clearly meet the deistic or religious requirement necessary for most definitions of "creed".

I base this finding on the religious tenets that were set out in some detail in the constitution and bylaws and, more particularly, in Bylaw No. 2 which appears at pages 4 to 6 above. However, counsel for the Commission contended that these tenets, while clearly Christian in content, were nevertheless too broad to constitute a creed, or system of belief, as was held in R. v. Ontario Labour Relations Board, Ex parte Trenton Construction Workers Association, Local 52 (1963), 2 O.R. 376. In my opinion, that case is clearly distinguishable in view of the evidence that the references

in the union's constitution to "Christian social principles" were neither theologically grounded nor credally oriented. By contrast, the bylaws in the matter before me are clearly driven by very traditionally recognized theological principles (see: Transcript, vol. II, p.338-41).

Nevertheless counsel for the Commission was right to question this insofar as the respondents represent a nondenominational (or what might more accurately be referred to as a multidenominational) group of adherents to various faiths (see: Transcript, vol. II, p.312 and 318). Their diversity notwithstanding, however, the members of these various faiths not only have combined resources to form a single school system; as well, they have gone so far as to set out the religious beliefs that are to govern the school in a collective and systematic doctrinal format - namely, in the constitution and bylaws (see: Transcript, vol. II, p.344-5) - that, in my opinion, qualifies as a creed.

Before proceeding to consider the b.f.o.q.issue, however, I must deal with one final submission that was offered by Commission counsel to sustain her argument that the bylaws did not constitute a credal system of beliefs. In effect, this submission seemed to rest on finding an identifiable doctrine proscribing common law relationships in the bylaws were they to qualify for credal status (see: Transcript, vol. II, p.313 and 316-9). If this was counsel's submission, I must reject it since I have been unable to find any authority requiring such specificity in the

enumerated system of beliefs that would otherwise constitute the "creed" for the purposes of section 23(a).

In my opinion, the issue of whether the complainant had any notice of the common law relationship proscription might better have been raised in the context of the first, or subjective, component of the b.f.o.q test. As derived from the Etobicoke case, this component would require that the qualification proscribing common law relationships

> must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which would defeat the purpose of the Code (see: Etobicoke, p.208).

Since it was obvious from the evidence that the respondents honestly, in good faith, and sincerely believed it was unacceptable for their teachers to live in common law relationships, prior notification to that effect could only have helped their cause, relieving against any hint of arbitrariness. But I do not need to decide this issue because counsel for the Commission conceded that the respondents had met this bona fide branch of the b.f.o.q. test (see: Transcript, vol. II, p.309 and 314); and wisely so, given that Mr. Bangma had explicitly advised Ms. Garrod in March 1986, when they first discussed her separation, to keep him informed of any changes in her situation (see: Transcript, vol. II, p.254).

Thus the conflict between the competing rights in issue in the matter before me - marital status and religious conformance - falls to be decided only according to the second branch of the b.f.o.q. test. In the Etobicoke case, this second component involved determining whether the qualification was

> related in the objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public (see: Etobicoke, p.208).

Subsequently, in Brossard, Mr. Justice Beetz held that this "reasonable necessity" test could be examined on the basis of two questions:

> (1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question. In Etobicoke, for example, physical strength evaluated as being a function of age was rationally connected to the work of being a fireman.
>
> (2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The 60 year mandatory requirement age in Etobicoke was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job (see: Brossard, p.311-2).

Finally, in Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, Madam Justice Wilson observed that while the Court had not drawn attention to the second of the Brossard questions previously,

nevertheless it was simply addressed to "the availability of alternatives to the employer's rule".

In the matter before me, in order to decide whether the qualification is "rationally connected" to the employment, I am not being asked to consider whether religious conformance in general is to be required of all of the teachers if there is to be an appropriate spiritual atmosphere in Rhema Christian School. Indeed, from the evidence before me, I take that generalization to be a given; as such, however, it is not determinative of the specific issue of whether all common law relationships must be proscribed for all of the School's teachers in order to achieve the appropriate spiritual atmosphere. Counsel for the respondents has argued that the bylaws, the Ten Commandments, the Parent Handbook, and even the provincial Education Act all coalesce in support of the claim that living common law is an issue of lifestyle and that teachers' lifestyles and conduct must be exemplary in a Christian school. The "rational connection" is between lifestyle and the duties and expectations of teachers as role models.

In the context of this argument, much depends on whether role model theory actually has an effect on students, particularly given the external forces that inevitably impinge on their consciousnesses. No evidence of such studies was introduced, counsel preferring to rely mainly on logical and impressionistic arguments. Nor was any evidence introduced of the force of the connection claimed

between teachers' personal and occupational lifestyles. Essentially, argument was concentrated on the specialness of the private religious school. In some sense it was possible to understand that role model and lifestyle issues may count mainly in a reinforcing mode rather than in an activist mode. Yet even on a balance of probabilities, I have found it difficult to reassure myself that the respondents established the "rational connection", otherwise than intuitively which, given the behavioural focus to which they aspire, seems inconsistent at the very least.

Nevertheless, other than asking why a formal marriage under civil law was necessary to be in compliance with Christian ethics and principles (see: Transcript, vol. II, p.325), counsel for the Commission concentrated her argument on the lack of clarity in the rules applied by Rhema Christian School. Unfortunately the latter submission was not particularly helpful, or else insufficient direction was provided thereto, to the "rational connection" question. Nor, indeed, did either counsel address the second of the Brossard questions about the availability of alternatives. Yet, given the Code protection for common law arrangements, some alternative seems called for. Ultimately, however, I find that on a balance of probabilities, the respondents have made out their section 23(a) claim for a b.f.o.q. for their proscription of common law relationships for their teachers under the more general rubric of the need for religious conformance in their school. In so finding, I

would not like to be seen as approving of the abrupt ruptures in occupational and social relationships that the respondents set in motion when they learned of Ms. Garrod's living arrangements. In this respect it is to their credit that their beliefs do allow of repentance; they might do worse than consider how to facilitate it should such a situation ever occur again.

(b) Marital Status: A Reasonable and Bona Fide Qualification

Under the circumstances, there is no need for me to consider and decide this issue.

(3) The Proper Parties

Nor is it now necessary for me to decide the argument submitted by counsel for the respondents about dropping the names of the two individual party respondents - Mr. Len Bangma and Mr. Ray Hendriks - from the proceedings because, in his words, their "conduct is accepted by the Society as being done properly within the authority and scope of their duties and functions for the organization" (see: Transcript, vol. I, p.9). Since there was no evidence before me to suggest that either of these individuals was not acting in the course of his duties, I was inclined to grant his request. Had I done so, however, only Rhema Christian School would have remained as a party respondent.

Yet neither counsel was prepared to claim that the School was a corporate entity. Indeed to the contrary,

counsel for the respondents asserted "that the Ontario Human Rights Commission was advised on April 4th of 1987 ... in writing - that the complaint can only be properly responded to by the Peterborough Christian School Society, which is the corporation that operates Rhema Christian School" (see: Transcript, vol. I, p.12). That assertion was, of course, consistent with the fact that all written correspondence from Mr. Bangma, whether to Ms. Garrod or to others, not only made reference to Rhema Christian School in the letterhead but also, to the Peterborough Christian School Society Inc. at the bottom of the page (see: Exs. 8, 10, 12, 13, 17, and 24).

Under these circumstances, I might well have found that the Peterborough Christian School Society Inc. was the only proper party to respond to Ms. Garrod's complaint. But counsel for the Commission did not ask for the Society to be added as a party, preferring instead to rely on the words of section 38(2)(d) of the Human Rights Code. At this time I wish to say that I cannot believe that I could have relied on the wording of section 38(2)(d) to add the Peterborough Christian School Society Inc. as a party respondent after the hearing had ended, which is when I came to my decisions about rights infringements. In fact, it is difficult to believe that such a power could ever be exercised at that stage in the proceeding without seriously prejudicing the party, whether with respect to the right to cross-examine

the complainant, to give response evidence-in-chief, or to make legal argument in defence of its own position.

Still, it was true that counsel for the respondents had full opportunity to cross-examine the complainant and frequently did so from the perspective of the Society. As well, the respondents' evidence-in-chief was given by Mr. Bangma who was in fact the chairman of the Board of Directors of the Peterborough Christian School Society Inc. during the crucial time period when the events surrounding Ms. Garrod's dismissal were occurring and thereafter as well when the complaint was lodged. And finally, when it came to response argument, no effort was spared by counsel when he advanced the argument that the respondents were entitled to rely on section 23(a) of the Human Rights Code. In effect, given that the opening words of section 23(a) refer to "a religious, philanthropic, eductional, fraternal or social *institution* or *organization*" (emphasis added), I would have been hard pressed to understand how a section 23(a) argument could even have been raised otherwise than on behalf of a respondent that was a collective legal, or corporate, entity.

I raise these matters at this stage because I was not satisfied with the way in which the Commission dealt with this issue about the proper parties. Had my decision turned out differently, there might have been liability without responsibility were I not inclined to add the Society after the hearing, as indeed I was not.

C. Respondents' Request for Costs

The jurisdiction to award costs to a respondent is set out in section 40(6):

> 40. (6) Where, upon dismissing a complaint, the board of inquiry finds that,
>
> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
>
> (b) in the particular circumstances undue hardship was caused to the person complained against,
> the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

Counsel for the respondents made a very weak, completely unsupported, submission under this provision (see: Transcript, vol. II, p.333-4). I am not prepared to grant either request. The matter before me was at no point trivial, frivolous, or vexatious; nor was there any evidence that it was made in bad faith. Indeed, the very fact that two legally sound competing rights were in issue, made it important that the matter get a hearing. There was no way that either party could determine the outcome absent a hearing of the legal issues. The legal issues themselves were novel and likely to be seen again in future cases. Nor was there any evidence produced at the hearing with respect to hardship and costs.

THIS COMPLAINT IS HEREBY DISMISSED.

OCTOBER 14, 1991

B Baines

Beverley Baines
Board of Inquiry